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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union.

Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR PETITIONERS

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals entered on June 2, 1953 (R. 70-78) was modified on petition for rehearing (R. 95) and as so modified (R. 95-103) is reported at 264 S.W. 2d 250. The opinion of Judge Lampe in the Jefferson Circuit Court, Chancery Branch (R. 22-33) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked on the ground that the highest court of the State of Kentucky in which a decision could be had has affirmed a permanent injunction (R. 35-37) which invades the area of labor relations law preempted by, and conflicts with, the provisions of the Labor Management Relations Act (29 U. S. C. 141, *et seq.*) and similarly invades the area of interstate commerce law preempted by, and conflicts with, the provisions of the Interstate Commerce Act (49 U. S. C. 316 (d), 316 (e) and 322 (b)). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

The judgment of the Court of Appeals of Kentucky was entered on June 2, 1953 (R. 70). A petition for rehearing was filed by petitioners on August 1, 1953, (R. 79). An order modifying the opinion of June 2, 1953, and overruling the petition for rehearing was entered on February 5, 1954 (R. 95).

On April 23, 1954, an order was signed and entered in this Court by Mr. Justice Stanley Reed, extending the time within which to file a petition for writ of certiorari to and including July 3, 1954 (R. 104).

The petition for writ of certiorari was filed on July 2, 1954, and certiorari was granted on October 14, 1954 (R. 104-105).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Article I, Section 8 and Article VI, Clause 2), of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., 141, *et seq.*), of the Interstate Commerce Act (49 Stat. 558, 54 Stat. 924, 49 U. S. C. 316 (d), 316 (e), 322 (b)), of the Constitution of Kentucky (Section 196), and of Kentucky Revised Statutes (Sections 281.600, 281.610, 281.685, 336.130) are set forth in the Appendix, *infra*, p. 92.

QUESTIONS PRESENTED

1. Does a state court have jurisdiction or power to compel "by injunctive process" union members, engaged in driving common carrier motor vehicles in interstate commerce and covered by a collective bargaining agreement permitting them to respect picket lines, "to cross a picket line advertising a lawful strike" conducted against another employer by other members of that same union, on the sole ground that a refusal to cross such picket line interferes with a duty imposed by state law on common carriers to deliver to all customers without discrimination,[1]

(a) in view of those sections of the Labor-Management Relations Act of 1947[2] protecting the right of employees to refuse to enter the premises of another employer whose employees are engaged in a lawful strike; or

(b) in view of those sections of the Interstate Commerce Act[3] making it unlawful for any common carrier by motor vehicle to subject any person to any unjust discrimination, and giving the Interstate Commerce Commission exclusive and primary authority to determine whether any discrimination has been engaged in, and giving the federal district courts jurisdiction to enjoin such discriminatory activities upon application of the Interstate Commerce Commission?

2. Does a state court have jurisdiction or power to enjoin the use of or to declare illegal an agreement between a common carrier and a union representing its employees, under which such employees are permitted to respect picket lines without fear of discharge, under the circumstances and in view of the considerations set forth in Question 1 above?

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[1] The verb "compel" and the quotations herein are from the statement of the question as framed by the Kentucky Court of Appeals below (R. 19).

[2] Section 7, the proviso to Section 8(b), Section 13, Section 501(2) and Section 502.

[3] 49 U.S.C. §316(d), 316(e), and 322(b).

STATEMENT OF THE CASE

The Certification of Local 89 by the National Labor Relations Board

On February 5, 1953, the National Labor Relations Board certified the General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L., hereinafter called Local 89, as the exclusive bargaining representative of a unit composed of all non-supervisory employees including truck drivers of the American Suppliers, Incorporated, hereinafter called American Suppliers, at its operation in Louisville, Kentucky, (Tr. 224-225).[4] Thereafter Local 89 attempted to negotiate a contract with the American Suppliers, and when they were unable to come to terms, called a strike of the employees of American Suppliers in support of their bargaining demands. The strike began on March 30, 1953 (R. 4, 52, 60-61, 71, 96, Tr. 227-228).

The Complaint Filed in the Kentucky Courts

On April 4, 1953, the instant case was begun by the filing in the Jefferson Circuit Court, Chancery Division, of Kentucky, of a petition in equity in which the American Tobacco

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[4] The unit description as it appears in the certification issued by the National Labor Relations Board (Case No. 9-RC-1743) is as follows:

> "All employees of the employer at its operation in Louisville, Ky., including ; ck drivers, fork lift operators, male and female redryers, storage men, mechanics and maintenance men and stemmery and seasonal employees, but excluding office clerical, engineers, time-keeping, watchmen, guards, foremen and all other supervisors within the meaning of the Act."

The Board's direction of election and certification in the above case are unreported. The Board's decision dismissing for inappropriateness of the unit requested, an earlier petition filed by Local 89 in which it sought to represent only a portion of the above described unit is reported in *American Suppliers, Inc.*, 98 N.L.R.B. 692 (9-RC-1424, March 17, 1952).

Company, Incorporated, hereinafter called American Tobacco, was the sole plaintiff, and Local 89 and certain individuals as representatives of a class consisting of members of Local 89 were the defendants (R. 1-2). The petition alleged that Local 89 and its members were picketing the gates to the American Tobacco plant in Louisville, Ky., although the only dispute which Local 89 had was solely with American Suppliers and not with American Tobacco (R. 3-4). While admitting that American Tobacco owned the majority of stock of American Suppliers, has purchased tobacco from American Suppliers and operated a plant located immediately in front of the American Suppliers plant, it was alleged that the two businesses were entirely different, that no such purchases of tobacco had been made since the beginning of the strike, and that the principal entrances to the two plants were separate (R. 3-4). The American Suppliers was not named as a party.

The petition described the business of the American Tobacco as "nationwide" with substantial movements in interstate commerce of raw materials and supplies to, and finished products from, its Louisville plant (R. 2). It was alleged that Local 89 has "induced, encouraged, coerced and conspired with" common and contract carrier truck lines and their employees to refuse to receive interstate shipments of goods to or from the American Tobacco's plant in Louisville, Kentucky (R. 6).

The conduct of Local 89 was alleged to have been wrongful in that it "attempted to draw into their dispute with American Suppliers, Incorporated, strangers to their dispute, to-wit: Plaintiffs and its employees, its suppliers, its customers and other persons with whom plaintiff does business, none of whom are within the sphere of the dispute between the defendants and American Suppliers" (R. 4-5; cf. R. 6). The picketing was alleged to have been "in violation of public policy and the law of the State of Kentucky" (R. 4). And it was alleged that Local 89 had induced various persons, firms and corporations "to refuse to enter into or

perform contracts with plaintiff in accordance with their legal obligations to plaintiff and their duties as common carriers" (R. 6-7).

The Temporary Restraining Order Issued by the Kentucky Courts

Both temporary and permanent injunctive relief was sought (R. 7-8). A temporary restraining order was issued on April 6, 1953, enjoining Local 89 and each of its members from picketing the principal entrances to the American Tobacco plant, from refusing to handle property shipped to or by American Tobacco and from inducing or arranging with common carriers or their employees not to handle such property (R. 10-11).

By its answer Local 89 alleged that by virtue of the interstate character of the operations of each American Tobacco and American Suppliers and by virtue of the statutes of the United States, jurisdiction to enjoin unfair labor practices including alleged secondary boycotting activities is vested exclusively in the Federal Courts in suits initiated exclusively by the General Counsel of the National Labor Relations Board (R. 13-14, 16).

The Evidence Adduced at the Hearing in the Kentucky Courts

The case was then set down for hearing on the application for permanent injunction on April 14, 1953, at which time evidence was taken. In addition to extensive evidence directed to the issue of whether picketing at the gates of American Tobacco constituted primary or secondary picketing, the evidence also established that the employees of the common carriers which refused to receive shipments to or from American Tobacco were members of Local 89, employed under a contract which permitted them to refrain from crossing picket lines or handling unfair goods (R. 19-22, 49-50, 63, 99, 102-103). Thus Article IX of the contract between Local 89 and the carriers, known as the Central

States Area Over-the-Road Motor Agreement, for the period from February 1, 1952, to January 1, 1955, provided (R. 21-22):

> "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods."

Similarly Section 3(c) of Article II of the agreement between Local 89 and other unions and Over-the-Road Truck Operators and other carriers at all times here material provided (R. 19, 21, Tr. 119 (e)):

> "It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods. The term unfair goods, as used in this section includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at whose terminal or terminals or place of business there is a controversy between such carrier or its employees on the one hand and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled, or used by the interchanging of succeeding carriers whether parties to this Agreement or not, until such controversy is settled."

The Opinion and Judgment of the Kentucky Trial Court

On April 22, 1953, the trial court handed down an opinion rejecting Local 89's contention that exclusive jurisdiction of the cause of action asserted was vested in the National Labor Board and the Federal Courts by the Labor Management Relations Act (R. 25-27). It found that American Suppliers was a wholly owned subsidiary of American Tobacco and that "Geographically the two companies are so closely enmeshed as to make it almost impossible to separate them" (R. 29-30). The trial court accordingly held that Local 89 "has the right peacefully to picket American Tobacco"

(R. 31). However, in dealing with the right of the pickets to induce persons not to make deliveries of property to American Tobacco, the trial court held that the fact that American Tobacco was not a party to the labor dispute made such inducement a violation of Kentucky law. In this connection the trial court stated (R. 26-27):

> "If the Union pickets American Tobacco when it has no dispute whatsoever with American Tobacco, (conceding for the purposes of this discussion that American Tobacco is a stranger to this labor dispute), and by so doing coerces or influences persons not to make deliveries of needed merchandise and material to American Tobacco, the American Tobacco Company is placed in a position to suffer irreparable damages. * * * It may be that this wrong constitutes a secondary boycott which could give rise to a remedy under the Taft-Hartley Act. But that wrong also constitutes a violation of Kentucky law in a field not covered exclusively by the Federal Act. It is violative of the Kentucky Constitutional provisions, which seek to protect the private property of our citizens and also contrary to K. R. S. 336.130, not necessarily because it is a secondary boycott but because it is an unfair and illegal act calculated to cause irreparable damage to plaintiff."

In the foregoing opinion the trial court made no reference to any alleged interference by Local 89 with the performance by common carriers of their alleged duty to serve all shippers and consignees. However, on April 23, 1953, the trial court filed a "Memorandum Opinion on Terms of Injunction" in which it recited plaintiff's contention that the threat of members of Local 89 who were also employees of common carriers to refuse to make deliveries to American Tobacco violates Kentucky Revised Statutes 281.685 wherein a common carrier is enjoined from subjecting any person to any unreasonable discrimination and other provisions of the same chapter making it unlawful for any person to cause, aid or abet such discrimination (R. 34). The trial court stated its opinion that the permanent injunction should restrain such unlawful discrimination (R. 35).

The judgment entered on April 23, 1953, permitted picketing, but enjoined Local 89 and each of its members from maintaining excessive numbers of pickets, from threatening injury to persons or property, from using abusive language and (R. 36-37):

> "4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers."

The effect of the above-quoted portion of the judgment is to require members of Local 89 who are employed by common carriers to cross the valid picket line established by Local 89 at the situs of its primary dispute with American Suppliers. This is the construction which has been placed on the similar language contained in the temporary restraining order issued in this case, in proceedings in which members of Local 89 have been held guilty of contempt solely for refusing to cross the valid picket line maintained at American Suppliers.[5]

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[5] The temporary restraining order above referred to contained a clause reading as follows (R. 9):

> "From refusing or inducing, encouraging, coercing or otherwise causing or arranging with, the employees of other employees (sic), particularly common carriers, or with such employers, to refuse to accept, handle, transport and deliver in accordance with their legal and contract obligations, property shipped by or to plaintiff."

Certain of Local 89's members employed by a common carrier respected the picket line at the premises of American Suppliers and solely because of their refusal to cross this picket line were found guilty of contempt of court for violating such order (R. 32-33, 39-40).

Another example of the construction given the above-quoted por-

Local 89 was not held in contempt because it had not only ceased inducing its members not to make deliveries but had also informed the interstate carriers that it would not intervene should they discharge such employee members of Local 89 as refused to cross the picket line to transport property to and from American Tobacco and had in fact not objected when such a discharge of a union member did in fact occur (R. 19-20, 33, 40). While no review of these contempt proceedings is here involved, this construction of the language of the temporary restraining order is relevant to show that the similar language in the permanent injunction which is before this Court for review, has the same meaning and effect.

Although the record disclosed that almost all of the shipments by common or contract carriers to and from American Tobacco were interstate in character (R. 6, 12, 27, 38, 41, 42, 51, 52, 53, 58), the decree made no distinction between common carriers subject to the Interstate Commerce Commission under the Interstate Commerce Act and carriers involved in purely intrastate operations.

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tion of the final decree is seen under a rule to show cause why contempt should not lie for the action of certain members of Local 89 employed by the Middle West Freightways, Inc., a common carrier, in refusing to pick up a shipment at American Tobacco for delivery to Kansas City, Mo., the refusal being occasioned by the refusal to cross the picket line (R. 37-38, Tr. 141). The rule was respited until May 18, 1953 (Tr. 145), and the record does not reveal any further disposition of this matter.

Respondents, in their Response to the Petition for Writ of Certiorari, pp. 4, 5 and 16, argue that Local 89 was not a party to any refusal to cross the picket line for the reason that it had expressly instructed its members to cross the picket line at the American Tobacco plant. However, the record discloses that this position of the union was taken only after the issuance of the temporary restraining order in this case and was prompted solely out of respect for such order (R. 12, 19-20, 33, 38, 44, 47-50, 54-55, 60-61, 62, 63).

The Opinion and Judgment of the Court of Appeals of Kentucky

Local 89 and its members prosecuted an appeal to the Court of Appeals of Kentucky from paragraph 4 of the permanent injunction (R. 36-37), quoted above, which required Local 89 and its members to forego its contracts with interstate carriers permitting respect for picket lines and nonhandling of unfair goods and which also required the members of Local 89 to cross picket lines to make deliveries to American Tobacco. The Court of Appeals affirmed the judgment of the trial court in all respects (R. 103).[6] The court stated the question which was before it as follows (R. 96):

> "May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike but he is not on strike himself?"

The gist of the answer which the Court of Appeals of Kentucky gave to this question is that while employees of a common carrier are free to strike they may not "refuse to handle freight for American while remaining in the service of their employer" (R. 99). This answer was based on that court's view that the duty of a common carrier to serve all members of the public without discrimination is imposed by the common and statutory law of Kentucky not merely on the carrier but also on its employees (R. 99). The Court of Appeals further held that the existence of a lawful picket line at the premises of the customer whether established by the union to which the carrier's employees belonged or by some other union did not constitute a valid excuse for failing to deliver goods to or from the customer so long as

[6] American Tobacco took a cross appeal from the denial of the trial court of its prayer that all picketing of its premises be enjoined, but was likewise unsuccessful before the appellate court with respect to this issue (R. 95-99, 103). No issue arising out of the cross appeal is before this Court.

the employees continued to serve non-picketed customers (R. 100-102).

The Court of Appeals rejected the contention of Local 89 that the Taft-Hartley Act both vested exclusive jurisdiction of the subject matter in the National Labor Relations Board and by the proviso to Section 8(b) expressly protected the right of an employee to respect a picket line at the premises of an employer whose employers are on strike under the auspices of the union certified as their representative (R. 101-102). In this respect the court stated as follows (R. 102):

> "The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. * * * It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States."

In addition, the Court of Appeals found that the agreement between Local 89 and various common carriers, permitting members of Local 89 to respect picket lines, was invalid as an interference with the common law duty of the common carrier to make deliveries to all customers without discrimination. The Court of Appeals stated in this connection (R. 102-103):

> "Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge

to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Here the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by statute which implements a constitutional provision, and we hold that such a contractual provision is void."

The Court of Appeals disposed of the petition for rehearing simply by adopting its previous opinion with some minor modifications (R. 95). Thus the Court of Appeals rejected, without opinion, the contention of Local 89, raised specifically on rehearing (R. 84-94), that jurisdiction to define duties of interstate common carriers engaged in interstate commerce lies exclusively in the Interstate Commerce Commission under the Interstate Commerce Act. The Court of Appeals did, however, consider, and pass upon by rejecting, this contention as well as all others made in the petition for rehearing (R. 103-104).

SUMMARY OF ARGUMENT

I.

A. The injunction issued by the Kentucky courts is invalid because it exercises control over a subject matter which has been federally preempted by the Labor Management Relations Act. The injunction restricts Local 89 in the extent to which it may peacefully induce employees and nonemployees not to cross the picket line established as an incident of the strike which the local, as the federally certified agent of employees of American Suppliers, is conducting in support of its bargaining demands. The effect of the

injunction is to define the permissible area of economic combat within which Local 89's labor dispute with American Suppliers is to be conducted.

Congress by the Labor Management Relations Act defined the permissible area of economic combat within which disputes by federally certified bargaining agents are to be conducted. It drew a careful line between those persons, whether employees or not, so remote from the immediate dispute as to exclude their proper concern and those sufficiently closely related to the dispute as to warrant their permissible participation. Congress by Section 8(b) (4) of the National Labor Relations Act, as amended, made it an unfair labor practice for a union or its agents to induce employees to refuse to handle or transport property where the purpose of such refusal was to cause their employer to cease doing business with someone else, subject to the exception stated in the proviso to Section 8(b) that employees are not prohibited from refusing to enter on the premises of an employer against whom an authorized bargaining agent is conducting a strike. Congress by Section 7 preserved to employees the right to engage in all acts of assistance to unions and all concerted activities for mutual aid or protection which were not outlawed by Section 8(b) as unfair labor practices.

Congress vested in the National Labor Relations Board and the federal courts exclusive jurisdiction to administer the foregoing provisions of the National Labor Relations Act, as amended. In deciding cases the Board and the courts have given concrete expression to the Congressional intent that the area of economic combat be restricted to persons whose duties may bring them to the situs of the primary dispute. A whole body of federal precedents governs the determination as to whether the relationships between two affiliated companies, such as American Suppliers and American Tobacco, require that American Tobacco be treated as a secondary rather than a primary employer. Likewise, decisions define the situs at which picketing may

be conducted; the propriety of noncoercive appeals to carriers, their supervisory and managerial force, as distinguished from their employees, not to serve a strike customer; the validity of collective bargaining contracts permitting respect for picket lines or non-handling of unfair goods.

Congress did not except from the area federally preempted the regulation of labor relations of common carriers by motor vehicle. To the contrary, it expressly forbade cession to the states of labor problems in "transportation except where predominantly local," even where state laws respecting labor relations are not inconsistent with federal laws. Section 10(a). This was in accord with the policy reflected in other provisions of the Act of assuming full federal control and excluding states from governing labor relations of all industries, including industries peculiarly critical to local welfare. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383. The National Labor Relations Board and the courts have therefore held that the Labor Management Relations Act governs the labor relations aspects of picket line inducement of employees of common carriers by motor vehicle.

The Interstate Commerce Act governs the extent of a common carrier's duty to serve without unjust discrimination. If any exception from generally applicable federal labor law is to be made in favor of common carrier duties, it is for Congress or the National Labor Relations Board or the Interstate Commerce Commission to establish the rule in the first instance, subject to review by the federal courts, and not for the state courts. *Garner* v. *Teamsters Union*, 346 U. S. 485; *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439, 440, 448.

B. The injunction issued by the Kentucky courts is further invalid because it conflicts with the Labor Management Relations Act. It drastically curtails the members of Local 89 in their efforts to secure a collective bargaining contract for the non-supervisory employees of American Suppliers,

for whom the local has been certified by the National Labor Relations Board as their exclusive collective bargaining representative. The practical effect of the injunction entered is to limit the collective bargaining power of Local 89 and its members in much the same way as collective bargaining power was limited in the Michigan strike vote statute and the Wisconsin Public Utility Anti-Strike Act which were for that reason held invalid as in conflict with federal law in *Auto Workers* v. *O'Brien*, 339 U. S. 454 and *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383.

Instead of purporting to limit the right to strike, Kentucky has permitted the strike but so drastically limited the support therefor which members of Local 89 may give or seek as to make the right to strike almost meaningless. This it has done by compelling members of Local 89 who are employed by interstate carriers to cross picket lines established at American Suppliers, even though their terms of employment expressly exclude such work. By compelling members of the local to cross the picket line established at American Suppliers, when Sections 7 and the proviso to Section 8(b) protect their refusal to cross, the injunction below deprives employees of their rights under federal law.

The injunction further deprives Local 89 and its members of valuable provisions in their collective bargaining contracts with common carriers. The Kentucky court expressly held void, and by its injunction required disregard of, the contractual provisions by which members of Local 89 had secured the agreement of carriers to what was in effect a job description which excluded crossing of picket lines and handling of "unfair goods" from the scope of employment. Where, as here, interstate carriers have voluntarily entered into collective bargaining contracts containing clauses permitting respect for picket lines and non-handling of "unfair goods," such clauses are valid under federal law. *NLRB* v. *Rockaway News*, 345 U. S. 71, 80, 81; *Rabouin* v. *NLRB*, 195 F. 2d 906, 912 (C. A. 2). Cf. *Teamsters Union (McAl-*

lister Transfer, Inc.), 110 NLRB No. 224, 35 LRRM 1281 (December 16, 1954).

II.

The application by Kentucky of its state laws defining the duties of a common carrier also intruded upon the area preempted to the Interstate Commerce Commission by the Federal Motor Carrier Act. The carriers involved were, with possible exceptions not here material, interstate. The Federal Motor Carrier Act conferred on the Interstate Commerce Commission exclusive primary jurisdiction to issue cease and desist orders which define the duty to serve without discrimination. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439. Within its jurisdiction is the determination of a carrier's duties, if any, to serve customers who are being picketed. *Montgomery Ward & Co., Inc.* v. *Chicago, Milwaukee, St. Paul & P. R. Co.*, 268 I.C.C. 257. The Kentucky court defined these duties as the basis for an injunction requiring employees of interstate carriers to conform to state standards of service. This injunction exceeded the powers of state courts.

The Interstate Commerce Commission has held that interstate common carriers by motor vehicle may properly establish a practice of not providing pick up and delivery service through picket lines at the place of business of the customer. The Commission has held that the establishment of such a practice constitutes a proper delimitation by the carrier of the extent of its holding out of service. *Pick Up and Delivery Restrictions in Official Territory*, 269 I.C.C. 191, 192-193. Since the collective bargaining contracts here entered into between the carriers and Local 89, proceeded on the assumption that the carriers would not hold themselves out to serve picketed customers, and since the carriers did not so hold themselves out, Kentucky has required the carriers and their employees to extend the scope of services offered by the carriers. The injunction thus conflicts with decisions of the Interstate Commerce Commission.

ARGUMENT

I.

The Labor Management Relations Act of 1947 precludes Kentucky from applying its laws defining the duties of a common carrier, to invalidate collective bargaining contracts with interstate carriers permitting respect for picket lines and non-handling of unfair goods and to compel crossing of picket lines by members of a federally certified union striking for bargaining demands.

A. The Labor Management Relations Act preempts the field of labor relations with which the Kentucky courts dealt when they compelled members of Local 89 to cross picket lines and invalidated contracts permitting such respect for picket lines.

Congress has made every act by which a union or its agents involve, or attempt to involve, other persons, whether employees or not, in a labor dispute, either a lawful act which the National Labor Relations Board is directed to protect from interference or an unlawful act which the National Labor Relations Board is directed to enjoin. Section 7 of the National Labor Relations Act, as amended, protects all acts of employees or their labor organizations to assist labor unions except insofar as those acts are made unfair labor practices by Section 8(b) of the Act. Congress has drawn a careful line between the protected and the prohibited. It has established machinery both to protect and to prohibit. Whenever a state intrudes it upsets the balance of power established by federal law. Even were the state to attempt to apply the same rules as the federal government, it would create chaos to have the possibility of different decisions by the state agency. Hence the state must keep out.

1. The Labor-Management Relations Act preempts the regulation of economic area within which employees or unions may give or seek support for a valid primary strike against an employer subject to the Act.

The original National Labor Relations Act was enacted in the same Congressional atmosphere as the Norris-LaGuardia Act (29 U. S. C. 101, *et seq.*) They both reflected the failure of the courts to recognize that "Just as conditions of labor in one shop react upon conditions of labor in another shop of the same craft, so conditions of labor in the craft as a whole influence labor conditions in other but allied crafts."[7]

This Court stated with respect to the Norris-La Guardia Act that (*United States* v. *Hutcheson*, 312 U. S. 219, 231):

> "the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, * * * to an immediate employer-employee relation." (Footnotes omitted.)

This policy of the Norris-LaGuardia Act was legislatively manifested by its statement of policy (29 U. S. C. 102) and its broad definition of "a case involving or growing out of a labor dispute" (29 U. S. C. 113 (a)) and by its definition of "labor dispute" (29 U. S. C. 113(c)). Similarly, Section 7 of both the original National Labor Relations Act and the amended Act states broadly that employees shall be protected in the right "to assist labor organizations" and "to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection" without any limitation upon the economic group which might be involved in the dispute. Section 2(3) of both the original Act and the amended Act provides that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise" and further provides that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." Section 2(9) of both the original

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[7] Frankfurter and Greene, The Labor Injunction (1930), p. 216.

Act and the amended Act defines "labor dispute" to include any controversy involving representation or terms, tenure or conditions of employment "regardless of whether the disputants stand in the proximate relation of employer and employee."

The National Labor Relations Board construed these provisions of the original Act as protecting employees in refusing to cross picket lines and in refusing to work on struck goods. It regarded each as an act of assistance to the union within the meaning of Section 7, if undertaken by the employee individually, and as a concerted activity for mutual aid or protection if undertaken by employees in concert. *Montgomery Ward & Co., Inc.*, 64 NLRB, 432, 445; *United Biscuit Co.*, 38 NLRB 778; cf. *Magnolia Petroleum*, 12 LRRM 551.

Some courts agreed. In his classic opinion in *NLRB* v. *Peter Cailler Kohler Co.*, 130 F. 2d 503, 505-506 (C. A. 2), Judge Learned Hand said:

> "When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping, and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

Judge Hand then added in language particularly significant here:

> "So too of those engaging in a 'sympathetic strike' or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check

> it, each separate extension is certainly a step in 'mutual aid or protection.' Cf. *Fort Wayne Corrugated Paper Co.* v. *NLRB*, 7 Cir., 111 F. 2d, 869, 873, 874. It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained (e.g. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 471, 472, 474 * * *) but it seems to us that the [Wagner] act has put an end to this."

Some courts tried to write limitations into the apparent breadth of economic involvement permitted by the Wagner Act. *NLRB* v. *Montgomery Ward & Co., Inc.*, 157 F. 2d 486 (C. A. 8), setting aside, 64 NLRB 432, 445; *NLRB* v. *United Biscuit Co.*, 128 F. 2d 771 (C. A. 7) enforcing in part and setting aside in part, 38 NLRB 778.

The Taft-Hartley Act was enacted for the express purpose of limiting the area of economic conflict permissible under federal law. During the hearings the almost unlimited breadth of the area of economic involvement in labor disputes permitted by the Norris-LaGuardia Act and the original Wagner Act was severely criticized. Senator Taft in his opening statement at the beginning of the debates on the Taft Bill, referring to these statutes said (93 *Cong. Rec.* 3834, 2 Leg. His. LMRA 1005-1006):

> "They do not distinguish between strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes, and strikes in the nature of secondary boycotts, jurisdictional strikes, and strikes of the racketeering variety."

Congress recognized that the drawing of a line limiting the permissible extent of economic involvement in a labor dispute would restrict labor's bargaining power. Sponsors of the Taft-Hartley Bills expressed the view that the Norris-LaGuardia Act and the original Wagner Act had overextended labor's bargaining power. Senator Taft stated (93 *Cong. Rec.* 3838, 2 Leg. Hjs. LMRA 1008):

> "The bill seeks to restore equality of bargaining pow-

er and imposes on the unions the responsibility to balance the power which they have acquired."

The sponsors of the Taft Hartley Act stated that they were engaged in a conscious process of balancing labor's need for adequate bargaining power with the interest of the public and neutrals in being free of the effects of unduly large segments of labor becoming involved in any grave labor dispute. Thus, in condemning sympathy strikes, Senator Taft stated (93 *Cong. Rec.* 4198, 2 Leg. His. LMRA 1107):

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. . . . On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes."

It was also felt that the prohibition of sympathetic strikes and secondary boycotts was essential to safeguard employers who "are the helpless victims of quarrels that do not concern them at all." H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 23, 1 Leg. His. LMRA 314. To the same effect see H. Rep. *op. cit.*, pp. 4-5, 1 Leg. His. LMRA 295-296; 93 *Cong. Rec.* 4198, 2 Leg. His. 1106; 93 *Cong. His.* 4835-4836, 2 Leg. His. LMRA 1350.

At the same time Congress recognized that collective bargaining must rest on the right to strike. Thus Senator Taft said (93 *Cong. Rec.* 3835, 2 Leg. His. LMRA 1006):

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions."

The sponsors of the Taft-Hartley Act believed that the traditional primary strike, with the right to picket the

premises of the primary employer and the right to respect that picket line, afforded labor ample bargaining power. Hence it attempted to frame the provisions of the amendments to retain these rights intact, while at the same time banning sympathy strikes and secondary boycotts. The language adopted carries out these intentions but leaves many borderline cases for determination by the National Labor Relations Board and the federal courts, as is apparent from our discussion of the various decisions of the Board and the courts which deal with issues raised by the factual situation considered by the Kentucky courts.

At the outset, however, it is apparent that the Court of Appeals of Kentucky did not regard Kentucky law as drawing the line between permissible economic involvement and prohibited economic involvement in a labor dispute in the same place as the federal law. For instance the Court of Appeals of Kentucky took the view that a sympathy strike by employees of common or contract carriers was permissible (R. 102), but so long as there was no such strike, employees of such carriers could not respect picket lines (R. 103). Indeed, the judgment below by its express terms compels crossing of the picket line only so long as the employees are handling, transporting or delivering property by or to other customers of such contract or common carriers (R. 37). Local 89 could have called a sympathy strike against all the common or contract carriers and thereby avoided having its members cross the picket line at American Suppliers without being in contempt. For by this device employees of carriers would not be making any discrimination among customers and it was only the duty not to discriminate which Kentucky purported to be enforcing (R. 36-37, 99-103). But, of course, such a sympathy strike would have violated Section 8(b)(4)(A) of the National Labor Relations Act, as amended. However, irrespective of whether Kentucky defined the area of economic combat permissible in the same way as the federal law it is clear that the practical effect of the decision below

is a definition by Kentucky of the economic area which might properly be involved in a labor dispute, which was the problem with which Congress was primarily concerned when it passed the Labor Management Relations Act.

Since its enactment the National Labor Relations Board and the federal courts have established a considerable body of interpretative decisions under the provisions of the Taft-Hartley Act which prohibit sympathy strikes and secondary boycotts but permit respect for primary picket lines. These decisions show that when the Board and the federal courts decide these issues they are engaged in applying the standards laid down by Congress for defining the economic area within which employees and labor organizations may properly extend their dispute.

a. The situs, which may be picketed, is governed by the Labor Management Relations Act.

The Labor Management Relations Act retained in Section 7 of the National Labor Relations Act, as amended, the language of the original Wagner Act which stated the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." This, of course, meant that the right to strike, was continued, for this and other courts have repeatedly held that Section 7 protects the right to conduct a strike. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, 389; *Auto Workers* v. *O'Brien*, 339 U. S. 454, 456-457; *Youngstown* v. *Sawyer*, 343 U. S. 579, 586; *Collins Baking Co.* v. *NLRB* 193 F. 2d 483 (C. A. 5); *Cusano* v. *NLRB*, 190 F. 2d 898 (C. A. 3); *NLRB* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840 (C. A. 4). In order that there could be no contention that any of the broad prohibitions placed upon union conduct should be construed as limiting the right to strike Congress specifically provided (Section 13, of the Act, as amended):

"Nothing in this subchapter, except as specifically

> provided for herein shall be construed so as either to interfere with or impede or diminish in any way the right to strike, * * *"

Similiary the right to strike includes the right to picket. Indeed Congress in the Labor Management Relations Act inserted a specific provision, designed to assure that none of the limitations therein imposed on union activity should have the effect of requiring any employee to cross a valid picket line. The final proviso to Section 8(b) (4) declares that:

> "Nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

This proviso, when read in conjunction with the provisions of the amended Act which define the acts which constitute unfair labor practices on the part of employees (Section 8(b)) shows that Congress has made the right to picket and to respect a picket line dependent upon the situs of the picketing. Unless the picketing occurs at the situs of an employer against whom a strike is being conducted by a representative of his employees whom the employer is required by the Act to recognize, it may be unlawful not to cross the picket line, depending on whether the refusal may come within some proscribed unfair labor practice.

The language of the proviso to Section 8(b)(4) would clearly have protected the refusal of members of Local 89 to cross any picket line at the premises of the American Suppliers, if only the premises of that employer were involved, since Local 89 was the certified representative of the employees of American Suppliers who were on strike and had approved the strike. However, because of the intermingling of the premises of American Suppliers and the

premises of American Tobacco, in order to determine the applicability of the proviso the National Labor Relations Board or federal courts enforcing the National Labor Relations Act would have been required to consider the relationship between American Suppliers and American Tobacco.

The issues which would have been considered by the Board and the courts under the applicable precedents, were three in number: (1) should the corporate entity between American Tobacco and American Suppliers be disregarded so that for purposes of this dispute they were one; (2) if not, was American Tobacco a neutral outsider or was it an ally of American Suppliers; and (3) if neither of the foregoing, was the situs of the primary dispute located on American Tobacco's property.

The Kentucky courts here gave consideration to each of these questions in determining whether picketing should be permitted at the premises of American Tobacco but completely ignored these considerations when they read into Kentucky labor law an exception in favor of common carrier obligations. Indeed the Kentucky trial court here relied upon one of the leading federal cases arising under the Labor Management Relations Act as authority that the separateness of the corporate entities of American Suppliers and American Tobacco was not conclusive that picketing of their common premises was secondary rather than primary (R. 30). The case cited and relied upon, *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D. N.Y.), held that picketing of a subcontractor to whom the struck employer subcontracted his work was permissible because he was an ally of the primary employer. To the same effect see *Mills* v. *United Association of Journeymen*, 83 F. Supp. 240 (W.D.Mo.). Common ownership of the stock of two corporations engaged in a straight line operation has been one basis on which the Board has found that the alleged secondary employer is not a neutral but rather an ally of the primary employer. *National Union of Marine Cooks*

and Stewards (Irwin Lyons Lumber Co.), 87 NLRB 54, 56. Compare the reliance of the Kentucky courts on the conveyor belt which conveyed tobacco directly from American Suppliers to American Tobacco (R. 97).

The leading decision of the National Labor Relations Board with respect to situs of picketing states the criteria applied by the Board as follows *(Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549):

> "When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. In the kind of situation which exists in this case, we believe that picketing of the premises of the secondary employer is primary if it meets the following conditions: (a) the picketing is strictly limited to times when the *situs* of the dispute is located in the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer." (Footnotes omitted.)

For various cases applying the foregoing criteria see *Teamsters Union (Associated General Contractors)* 110 NLRB No. 274, 35 LRRM 1369; *Associated Musicians (Gotham Broadcasting Corp.)* 110 NLRB No. 269, 35 LRRM 1370; *Douds* v. *Associated Musicians*, 123 F. Supp. 798, 801-802 (S.D.N.Y.) *Stover Steel Service*, 108 NLRB No. 221, 34 LRRM 1258; *Douds* v. *Business Machine & Office Appliance Union*, 122 F. Supp. 43 (S.D.N.Y.).

b. The extent to which respect for picket lines may be sought of, or accorded by, employees of secondary employers, is governed by the Labor Management Relations Act.

The chief provision in the Labor Management Relations Act designed to limit the area of economic conflict is Section 8(b)(4)(A). Its legislative history discloses that it was designed to proscribe sympathetic strikes and secondary boycotts. *NLRB* v. *Denver Bldg. Trades Council*, 341 U. S. 675, 685-687. Section 8(b)(4)(A) makes it an unfair labor practice for a labor organization or its agents:

> "To engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

This section would have required the National Labor Relations Board to have proceeded against the Teamsters Union for inducing employees of carriers to refuse to handle shipments to and from American Tobacco with the object of causing carriers to cease doing business with American Tobacco, unless such conduct of the Teamsters Union was protected by the proviso to Section 8(b) or was otherwise protected as incidental to a valid primary strike. *NLRB* v. *Denver Bldg. Council*, 341 U. S. 675, 688-689; *Electrical Workers* v. *NLRB*, 341 U. S. 694, 699-705.

The remedy which the Board would afford American Tobacco should it be able to establish that the picketing of its premises was not within the protected activities exempted from Section 8 (b)(4)(A), would be both speedy and effective. For Section 8 (b)(4)(A) proscribes an unfair labor practice deemed so harmful as to require immediate Board recourse to the federal district court for a temporary injunction as soon as a charge is filed and without awaiting any administrative hearing or determination. Section 10(l) of

the amended Act imposes upon the Board the mandatory duty to apply for such injunction.

The Board and the courts have recognized that Section 8(b)(4)(A) is the section by which Congress defined the extent to which neutrals were to be protected from involvement in labor disputes of others. Thus Judge Frank began his consideration of a Board order under Section 8(b)(4)(A), with the statement that (*NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 67 (C. A. 2)):

> "We have here a problem involving the rights of neutrals in a lawful economic war between an employer and a union. The Taft-Hartley Act does not completely shelter neutrals. * * * Instead the Act recognizes and undertakes to reconcile the competing claims of unions to strike and of bystanders to be free of harm from so-called 'secondary boycotts'."

Under this Section the Board and the courts have developed rules which they would apply in determining whether the conduct of the Teamsters Union constituted the proscribed inducement of employees of the carriers. These rules have been developed both in cases arising from charges filed by neutrals alleging that a union has committed unfair labor practices under Section 8(b)(4)(A) and by employees alleging that their employer has committed unfair labor practices under Section 8(a)(1) and (3). The cases show that these two subsections serve to make each act of peaceful picketing in connection with a strike for a lawful objective either proscribed or protected.

Considering first the cases arising upon charges of unfair labor practices under Section 8(b)(4)(A) as they develop law applicable to the factual issues presented to the Kentucky courts, this Court has held that even when the proviso to Section 8(b) is inapplicable picketing incidental to a primary strike is not prohibited by Section 8(b)(4)(A).

In *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 669-671, this Court dealing with picketing by a union

which had not acquired a majority at the picketed mill, held that Section 8(b)(4)(A) did not prohibit the union in the course of its picketing from encouraging "two employees of a neutral customer to turn back from an intended trip to the mill and thus to refuse, in the course of their employment, to transport articles or perform certain services for their employer." This Court held the conduct of the union was permissible even though it had as its object the forcing of the customer to cease handling, transporting or otherwise dealing in the products of the picketed mill. This Court there said (at 671):

> "The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by Section 8(b)(4). Insofar as the union's efforts were directed beyond that and toward the employees of anyone other than Kaplan, there is no suggestion that the union sought *concerted* conduct by such employees. Such efforts also fall short of the proscriptions of Section 8(b)(4). . . . A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of Section 8(b)(4), and they do not here." (Emphasis the Court's.)

And in *NLRB* v. *Denver Building Trades Council*, 341 U. S. 675, 687, this Court summarized its decision in the *International Rice Milling* case as holding that the conduct of "the union pickets near the mill" of an employer from whom the union sought recognition, in seeking "to influence . . . employees of a customer . . . not to cross the picket line," was "no more than was traditional and permissible in a primary strike."

Turning from the cases instituted against unions under Section 8(b)(4)(A), to those instituted by unions under Section 8(a)(1) and (3) discloses the full protection ac-

corded by the federal law to all picketing activities which are not proscribed.

Under the original Wagner Act it was an unfair labor practice for an employer to discharge an employee either for picketing or for refusing to cross a picket line.[8] The Board and the courts have uniformly reached the same result under the amended Act,[9] except in the situation where the refusal to cross the picket line was deemed a violation of the employee's contract of employment.[10]

The leading Board decision under the amended Act is *Cyril de Cordova & Bro.*, 91 NLRB 1121, 1134-1139. The Board held that a stock brokerage firm violated Section 8(a)(1) and (3) of the amended Act when they discharged one of their employees because he refused to enter the New York Stock Exchange to perform duties for the brokerage firm which required his presence on the premises of the Exchange where his refusal was based on the fact that the union of which he was a member was picketing the Exchange as part of a strike conducted by it on behalf of employees of the Exchange for which it was the recognized bargaining representative. The Board held that the refusal to cross the picket line was protected both by Section 7 and

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[8] *Magnolia Petroleum Co.*, 12 LRRM 551 (as in the instant case employees of a neutral employer refused to make or receive deliveries across a picket line established by the union of which they were members); *Cinch Mfg. Co.*, 91 NLRB 371; *Montag Bros., Inc.*, 51 NLRB 366, enforced 140 F. 2d 730 (C. A. 5); *Columbia Pictures, Inc.*, 82 NLRB 568, 71 (another unit of same employer); *Illinois Bell Telephone Co.*, 80 NLRB 1171, set aside 189 F. 2d 124, 127-128, 129 (C. A. 7), certiorari denied, 342 U. S. 885.

[9] *New York Telephone Co.*, 89 NLRB 383; *J. A. Bentley Lumber Co.* v. *NLRB*, 180 F. 2d 641, 642, 643, N. 3 (C. A. 5) enforcing 83 NLRB 803, 816, 824; *Standard Oil Co. of Calif.*, 91 NLRB 783, 787; *Coal Creek Coal Co.*, 97 NLRB 14; *West Coast Casket Co.*, 97 NLRB 820, enforced 205 F. 2d 902 (C. A. 9); *Cyril de Cordova & Bro.*, 91 NLRB 1121, 1134-1139; *Crowley's Milk Co., Inc.*, 102 NLRB 996, 997-998.

[10] *NLRB* v. *Rockaway News*, 345 U. S. 71.

by the proviso to Section 8(b)(4). With respect to the impact of Section 7 the Board said (at 1135):

> "There can be little doubt that Finn's refusal to cross the Stock Exchange picket line, established by his own Union, constituted an act of assistance to that labor organization within the meaning of Section 7.
>
> "Beyond that, Finn's refusal constituted 'concerted activities' for 'mutual aid and protection,' within the scope of that section. Finn had a substantial and legitimate interest in the successful prosecution of the strike against the Exchange, not only because of his union membership, but also because of the possible reciprocal effect improved conditions in neighboring and associated businesses of like kind might have on his own future conditions of employment.[13]
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> "[13] See *NLRB* v. *Peter-Cailler-Kohler Swiss Chocolate Co.*, 130 F. 2d 503, 505; cf. Section 13 of the Norris-LaGuardia Act (47 Stat. 70); *United States* v. *Hutcheson*, 312 U. S. 219."

The Board also pointed to the definition of labor dispute in Section 2(9) of the amended Act, which in this respect retained the broad sweep of the original Act, as showing that the protection of the Act encompassed aid to and concert with employees in another unit of the same or of another employer. In this connection the Board said (at 1135):

> "Nor is it controlling that Finn's activity was in connection with a labor dispute involving employees in another bargaining unit and of another employer. The reach of the Act is not limited to situations involving proximate employer-employee relationships.[14] It is well settled that except where the means used or the objectives sought are otherwise illegal or improper—the Act extends to protect employee activity conducted in furtherance of a labor organization's aims in another
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> "[14] See Section 2(9) of the Act; see also Congressional Reports, National Labor Relations Act, S. 1958, 74th Con., 1st Sess., Senate Report No. 573, p. 7.

unit of the same employer,[15] or even, as here, in a unit of a different employer.[16]

"[15] See e.g., *NLRB* v. *Biles Coleman Lumber Co.*, 98 F. 2d 18 (C. A. 9), enfg., 4 NLRB 679; *Club Troika, Inc.*, 2 NLRB 90, 94; *Montag Bros., Inc.*, 51 NLRB 366; *Pinaud, Incorporated*, supra; *Columbia Pictures*, 82 NLRB 70.

"[16] *Fort Wayne Corrugated Paper Co.* v. *NLRB*, 111 F. 2d 869, 873-874 (C. A. 7); *NLRB* v. *Peter-C-K. Swiss Chocolate Co.*, supra; *NLRB* v. *J. G. Boswell Co.*, 136 F. 2d 585, 596 (C. A. 9)."

The Board rejected the contention that Finn's refusal to cross the picket line was a partial or intermittent work stoppage. It said (at 1136):

"In giving expression to his desire to aid and assist his Union through sympathetic action, Finn utilized a conventional method, time honored in the history of the American labor movement, and one, moreover, that was the only practical means available to him for that purpose.

" * * * Unlike the situation in the 'partial strike' cases referred to above, Finn's refusal to perform part of his work was not a wilfully contrived violation of plant discipline as a means to an end. It was rather a necessary and unavoidable incidental effect of a form of concerted action undertaken in a conventional and traditional manner."

And finally the Board construed the proviso to Section 8 (b) (4) as conferring a positive protection upon the right of an employee to refuse to cross a picket line in the circumstances detailed. The Board stated (at 1137):

"The proviso clearly reflects that Congress recognized the traditional reluctance of employees to cross picket lines, and—under the particular conditions described in the proviso and present also in this case—regarded an employee's refusal to cross a picket line as a form of conduct not unjustifiable from the point of view of public policy. And this is so, no matter how the proviso in its relationship to Section 8(b)(4) is interpreted. If, as has been contended, the proviso is to be interpreted not as qualifying the provision of Section 8(b)(4), but as a general reaffirmation of individual rights, the conclusion that Congress intended

to retain within the protection of the Act conduct such as was engaged in by Finn would appear to follow as a matter of course. If, as it believed, Congress intended the proviso to engraft an exception on 8(b)(4), applicable to union unfair labor practices, the same result would follow. For obviously it would be absurd to say that a union may lawfully induce or encourage employees to refuse to cross a picket line under the circumstances described in the proviso, and yet simultaneously say that employees who refuse to cross are subject to forfeiture of their rights under the Act."

Accordingly, the Board required the stock brokerage firm to reinstate Finn with back pay.

c. The extent to which other persons may be induced to cease doing business with the primary employer is governed by the Labor Management Relations Act.

Section 8(B)(4)(A), which is the only section of the National Labor Relations Act, as amended, which proscribes secondary boycotts, is by its language limited to causing such boycotts by inducing employee action. It bans a union from engaging in, or inducing or encouraging employees to engage in a strike or concerted refusal in the course of their employment to perform services. The National Labor Relations Board and the courts have regarded this limitation as deliberate. Congress intended to protect neutral employers from strikes or employee refusals to perform instructions. But if a union could persuade a neutral employer voluntarily to refrain from dealing with the primary employer, Congress invisioned no harm to the public or neutrals. Thus so long as the interstate common carriers who might otherwise transport goods to and from a struck consignee or shipper acquiesce in a union's request that they respect picket lines, such carriers are not being victimized. Section 8(b)(4)(A) was not designed to protect the primary employer, but solely the innocent neutral who does not desire involvement. If a carrier voluntarily accepts involvement in the primary dispute, it by definition

is not a neutral whom Congress desired to protect: *Rabouin* v. *NLRB.*, 195 F. 2d 906, 911-912 (C.A. 2), enforcing 87 NLRB 972, 980-983; *Elliott* v. *Amalgamated Meat Cutters*, 91 F. Supp. 690, 696, 699 (W.D. Mo. S.W.D.); *Madden* v. *Local 442, Teamsters Union*, 114 F. Supp. 932, 937-938 (W.D. Wis.); *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2); *Humphrey* v. *Teamsters Union*, 25 LRRM 2318, 2321 (N.D.N.Y.); *Pittsburgh Plate Glass Co.*, 105 NLRB 740; *Kitty Clover, Inc.*, 103 NLRB 1665; *Crowley's Milk Co., Inc.*, 102 NLRB 996; *Local Union 878, Teamsters (Arkansas Express, Inc.)*, 92 NLRB 255; *Lumber and Sawmill Workers (Santa Ana Lumber Co.)*, 87 NLRB 937.

In *Rabouin* v. *NLRB*, 195 F. 2d 906 (C. A. 2) it appeared that the Teamsters Union had created a situation in which interstate carriers by motor vehicle were refusing to handle Rabouin's goods. The Teamsters Union had not induced employees of the carriers to strike or to refuse to handle Rabouin's goods, or to threaten such conduct but had achieved the carrier boycott of Robouin solely by requests directed to management or supervisory employees of the carriers.

In agreeing with the Board that the Teamsters Union had not violated Section 8(b) (4)(A) the court said (at 911-912):

> "The embargo on Rabouin's goods was the product solely of requests addressed to management or supervisory personnel. The former are clearly employers, and the latter have lately been so defined by the new § 2 (2, 11), 29 U. S. C. A. § 152 (2, 11). The union thus did not 'encourage the employees.'
>
> "The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person.' § 8(b)(4)(A)."

Similarly in *Madden* v. *Local 442, Teamsters Union,* 114 F. Supp. 932, 937 (W. D. Wis), the court refused to issue a temporary injunction for which the National Labor Relations Board applied under Section 10 (l) of the Act, where it appeared the carrier's boycott of the charging party's goods was achieved by the Teamsters Union without coercion of the carriers. The court said (at 937):

> "The employer under the terms of the Taft-Hartley Act may discard his neutrality in industrial disputes involving other employers."

In *Humphrey* v. *Teamsters Union,* 25 LRRM 2318 (N. D. N. Y.) the court said (at 2321):

> "It seems to be undisputed * * * that a secondary boycott induced by demands or threats addressed only to management or its representatives is not proscribed under the Act."

d. The validity of collective bargaining contracts permitting respect for picket lines and non-handling of unfair goods is governed by the Labor Management Relations Act.

Since Section 8(b) (4)(A) does not bar union appeals to other employers to cease doing business with the primary employer, it is not unlawful for unions to include in their collective bargaining contracts clauses providing that employees may refuse to cross picket lines or refuse to handle unfair goods. The effect of such a clause is to exclude from the duties imposed on the employee by his job any duty to cross a picket line or handle unfair goods. Indeed, the very same contract which the Kentucky courts held illegal was recently held valid by the United States District Court for the Western District of Wisconsin in a case arising under the Labor Management Relations Act, *Madden* v. *Local 442, Teamsters Union,* 114 F. Supp. 932 (W. D. Wis). There the Central States Area Agreement which appears in the reported decision (at 934-936) is the

same contract here involved (R. 21-22). There the District Court held that the refusal of members of Local 442 of the Teamsters Union who were employed by common carriers to handle goods shipped to or from a picket bound plant of a consignee or shipper was lawful under the Labor Management Relations Act because this was a valid collective bargaining contract. The court said (at 937-938):

> "Inasmuch as their employers had by contract consented to the 'unfair goods' provision of the contract, the failure of the employee to handle Wisco shipments was not a strike or concerted refusal to handle Wisco products in the course of their employment, within the meaning of Section 8(b)(4)(A), for that employment defined by the contracts excluded from their required duties work on 'unfair goods.' Causing the employees to exercise their contractual privilege, was not an 'inducement' to a concerted refusal of the employees to handle Wisco freight in violation of Section 8(b)(4)(A)."

The National Labor Relations Board also held the identical clause valid in *Pittsburgh Plate Glass Co.*, 105 NLRB 740; cf. *McAllister Transfer, Inc.*, 110 NLRB No. 224, 35 LRRM 1281 December 16, 1954.

For other cases in which the Board and the courts have held similar provisions in collective bargaining contracts valid see *Rabouin* v. *NLRB*, 195 F. 2d 906, 912 (C. A. 2), enforcing 87 NLRB 972, 982-983; *Teamsters Union (Arkansas Express)*, 92 NLRB 255; *NLRB* v. *Lodge* 850, *A. F. of L. Machinists and Local 880, A. F. of L.*, U. S. D.C.E.D. Mich., October 16, 1954; *Meier & Pohlmann Furniture Co.* v. *Gibbons*, U. S. D.C.E.D. Mo. E. D., January 10, 1955; cf. *Overtone* v. *Teamsters Union*, 115 F. Supp. 764, 770 (W. D. Mich.).

And this Court stated flatly that the proviso to Section 8 (b) (4) "clearly enables contracting parties to embody in a contract a provision against requiring an employee to cross a picket line if they so agree." *NLRB* v. *Rockaway News*, 345 U. S. 71, 80, 81.

2. The Labor Management Relations Act does not permit any exceptions from its generally applicable rules of labor relations to be made on account of state laws with respect to the duties of a common carrier.

One of the issues to which Congress gave consideration when it considered the Taft-Hartley Act was whether any exceptions from generally applicable labor law should be made in favor of any of the industries of such critical importance to the public that strikes or other labor disputes therein cause unusual public hardship. Congress deliberately decided not to make any exceptions, other than those listed in Section 2 (2) of the Act which excludes from the term "employer" only the United States Government, federal reserve banks, state governments, non-profit hospitals and persons subject to the Railway Labor Act and Section 2 (3) which excludes from the term "employee" only agricultural workers, domestic servants, independent contractors and supervisors.

Speaking of the proposals to prohibit strikes or work stoppages in industries of critical public importance, Senator Taft stated (93 *Cong. Rec.* 3835, 2 Leg. His. L.M.R.A. 1006).

> "If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded in the theory that there is a right to strike * * *."

The right to strike was thus preserved to all employees within the jurisdiction of the Act with the concomittant right to observe the picket lines of other strikers. For mutual respect for picket lines is, as Congress recognized, a basic ingredient of the right to strike. Only employees who are free to respect the picket lines of others have the right to strike for unless they can accord such picket line respect to others they cannot expect the reciprocal respect

for theirs should they strike. Unless employees can count on respect for their own picket lines their right to strike is virtually meaningless for a strike without effective picketing is hopelessly crippled from the start.

Congress made all the provisions of the amended Act applicable to every industry within the jurisdiction of the Act without exception. It was aware that the original National Labor Relations Board had uniformly applied the original Act to common and contract carriers by motor vehicle.

Not only did Congress fail to write into the Act any exceptions for common and contract carriers by motor vehicle, it expressly excluded the National Labor Relations Board from ceding to the states jurisdiction over "transportation" industry except when local in character, even where the state has the same substantive labor law provisions as are contained in the amended Act. Section 10 (a) of the amended Act permits such cession in all industries except those specifically enumerated. Transportation except when local in character, is specifically enumerated as an excluded industry. Since most transportation—all by rail or air—is covered by the Railway Labor Act, Congress must have had the common and contract carriers by motor vehicle specifically in mind when it manifested this intent to have their labor relations policy administered solely by federal agencies even where state agencies were administering the same substantive labor law.

Indeed, the Congressional intention to preempt labor relations in the transportation industry is further manifest by its listing as one of those industries to which the national emergency provisions of Sections 206 and 208 of the Labor Management Relations Act are applicable.

Accordingly, the National Labor Relations Board has, without exception, where interstate commerce is affected within the meaning of the Act, applied the various provisions of the Act to common and contract carriers with no less diligence and with no less effect than it has applied

such provisions to employers and employees in other industries.[11] It was in cases dealing with common carriers that the Board rejected the argument that contract clauses such, as the ones involved here are contrary to the policy of the Act. Indeed, all the cases we have discussed where clauses permitting respect for picket lines were held valid involved common carriers (see pp. 36-37, *supra*).

In only one of these, the *McAllister* case, 110 NLRB No. 224, 35 LRRM 1281 (December 16, 1954), was the Board presented with arguments that the duties of the common carriers to serve all comers barred respect for picket lines at the places of business of shippers or consignees. The Board properly deemed this an improper basis for reading exceptions into the generally applicable provisions of the Act governing the rights of employees to observe picket lines.

Earlier the Board had held that an employer could not discharge an employee because by his picketing he caused common carrier railroad trains to back away from the plant without making deliveries. The Board held that picketing railroad tracks was no different from any other picketing as far as the Act was concerned. *Standard Oil Co. of California*, 91 NLRB 783, 786-787.

Similarly, in *Globe Wireless, Ltd.* 88 NLRB 1262, 1265, 1266, enforced 193 F. 2d 748 (C. A. 9), the Board and the court rejected the contention that the employees, who engaged in a strike to protest the discharge of one employee, acted illegally because they interfered with the employer's obligations as a common carrier by radio under the Federal Communications Act. (47 U. S. C. 201, 214, 501). This Act

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[11] Representation proceedings: *Luper Transportation Co.*, 92 NLRB 1178; *Eldon Miller, Inc.*, 107 NLRB No. 117. Unfair labor practices; *Deluxe Motor Stages*, 93 NLRB 1425; *Direct Transit Lines, Inc.*, 92 NLRB 1715; *Ray Stone Transfer Corp.*, 99 NLRB 662; *Stibbs Transportation Lines*, 98 NLRB 422; *Malone Freight Lines*, 106 NLRB No. 176. See also Sixteenth Annual Report of the National Labor Relations Board (1951) page 25 and the Seventeenth Annual Report (1952) page 12.

makes it the duty of such carriers to serve all without discrimination and not to abandon service. Interference therewith is criminal. It was argued that under *Southern Steamship Co.* v. *NLRB*, 316 U. S. 31, the conduct of the employees in striking disqualified them for reinstatement equally with strikes of seamen deemed mutinous. In enforcing the Board's order requiring reinstatement of the strikers, the United States Court of Appeals for the Ninth Circuit stated (at 751):

> "A sufficient answer to the argument predicated on the Southern Steamship decision is that the Communications Act does not confer upon licensees thereunder the right to conscript labor, nor does it expressly or by reasonable implication undertake to restrict the right of employees to strike or quit their jobs, either singly or in concert. On the other side of the picture the right of employees to strike or to engage in concerted activities for their mutual aid and protection is expressly recognized in the National Labor Relations Act, 29 U. S. C. § 151 et seq. *International Union of Automobile Workers* v. *O'Brien*, 339 U. S. 454, 70 S. Ct., 781, 94 L. Ed. 978. It seems purely fanciful to assume, as does respondent, that the failure of a licensee to perform the obligations prescribed by the Communications Act would constitute a breach of such obligations on the licensee's part in instances where the failure is caused by an economic strike."

In *Overton* v. *Teamsters Union*, 115 F. Supp., 764, 769, 772 (W.D. Mich. S.D.), the United States District Court for the Western District of Michigan Southern District held that if there were any conflict between the Labor Management Relations Act and the law respecting the duties of common carriers the Labor Management Relations Act took precedence (at 772). Accordingly, it vacated an injunction issued by the Michigan state courts, which like the Kentucky injunction here involved, compelled members of the Teamsters Union who were employed by common carriers to deliver goods to and from the picket bound plant of a consignee or shipper although their employment was gov-

erned by collective bargaining contracts with carriers which expressly permitted respect for picket lines. The Michigan courts like the Kentucky courts here, based their injunction on the theory that common carriers had a duty to serve all customers which was superior to the right of its employees to respect picket lines. The District Court held that the Labor Management Relations Act preempted the field and precluded the Michigan courts from issuing the injunction. The District Court (at 770) also suggested that the injunction issued by the Michigan courts was probably in conflict with federal law because it interfered with the rights of the common carriers employees under contracts of a kind which had been held valid by the National Labor Relations Board, citing the *Rabouin* case 87 NLRB 792 and the *Pittsburgh Plate Glass Co.* case, 105 NLRB No. 120, discussed p. 37, *supra*. The District court further suggested that the conduct of the plaintiff in that case, a would-be shipper or consignee whose plant was being picketed by the Upholsters Union, not a defendant in the suit, in securing the state court injunction, interfered with the rights of employees in violating Sections 7 and 8(a)(1) of the National Labor Relations Act, and hence was in itself an unfair labor practice (at 769-770).

See also *Meier & Pohlmann Furniture Co.* v. *Gibbons*, (U. S. D.C.E.D. Mo. E. D., January 10, 1955) where the picket bound employer sued both common carriers and unions for damages under Section 302 of the Labor Management Relations Act which confers jurisdiction on courts to award damages for secondary boycotts which are there defined in the language used in Section 8(b)(4)(A). Damages were also sought under Section 316(b) of the Interstate Commerce Act which forbids unjust discrimination. The court denied damages under each provision, holding that the picket line clauses of the collective bargaining agreements were valid under the Labor Management Relations Act and provided a complete defense.

In three cases arising under the Norris-La Guardia Act

the federal courts rejected contentions that there was anything in the law respecting the duties of common carriers which necessitated reading any exceptions in favor thereof into that Act. In two of the cases, the common carriers had collective bargaining contracts with unions exempting their employees from any duty to cross picket lines. In the first of the cases the District Court had held the contract invalid as in conflict with the duties of a common carrier. On appeal the United States Court of Appeals for the Tenth Circuit reversed the injunction, which in disregard of the collective bargaining contract required employees to cross picket lines. *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines*, 1267 F. 2d 931, 933 (C. A. 10), certiorari denied 317 U. S. 645.

The latter case was followed and cited with approval in *East Texas Motor Freight Lines* v. *Teamsters Union*, 163 F. 2d 10 (C. A. 5). In affirming the refusal of the District Court to issue an injunction against a carrier and a union which were refusing to interline freight with the plaintiff because of a labor dispute between the union and the plaintiff, the court of Appeals stated (at 12):

> "Appellant is here insisting that the injunction was wrongly denied . . . since what was done was in violation of another congressional act, the Motor Carriers Act. . . .
>
> "We cannot agree . . . we are in no doubt that the case is wholly unlike those dealt with in *Allen Bradley Co.* v. *Union*, 325 U. S. 707. . . . Neither are we in any doubt that (since it is one so arising) plaintiff, not having complied or attempted to comply, with the Norris-La Guardia Act is in effect seeking to enlarge the jurisdiction of the federal courts as limited by that act by its claim that the court should issue the injunction because the acts complained of are violations of duties or obligations arising under the Interstate Commerce Act, 49 U. S. C. A. § 1 et seq. *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines*, 10 Cir., 126 F. 2d 931, a case directly in point, so decides, and we are in no doubt that it was well decided. The order appealed from is affirmed."

In *Southeastern Motor Carriers* v. *Hoover Truck Co.*, 34 F. Supp. 390 (D. C., Tenn.), the District Court pointed out that the effect of the injunction sought would be to invalidate clauses in collective bargaining agreements which permitted employees of the carriers to refuse to cross picket lines or handle unfair goods. It placed its denial of the injunction on the ground that there was nothing in the duties of employees of a common carrier which operated to suspend the Norris-LaGuardia Act. The court said (at 392):

> "The Norris-La Guardia Act, Title 29, U. S. C. A. § 101 et seq., does not carry any exception in favor of the Motor Carrier Act, Title 49 U. S. C. A. § 301 et seq. and this act does not suspend the Norris-La Guardia Act, nor does it vest this court with jurisdiction to issue injunctions in violation of the terms and provision of the Norris-La Guardia Act."

Because the Norris-La Guardia Act, like the National Labor Relations Act, is concerned with defining the permissible area of economic conflict, we submit there exists no more reason for narrowing that area by some assumed concern for common carrier duties in one Act than in the other. Hence the foregoing decisions under the Norris-La Guardia Act should be equally authoritative for the National Labor Relations Act, as amended.

Indeed, were the Board under the doctrine of *NLRB* v. *Southern Steamship*, 316 U. S. 31, 46-48, required to apply the National Labor Relations Act so as to give full effect to any duties which might be imposed on employees of common carriers because of the special calling in which their employers are engaged, the result here would be no different: First, because federal law governs that calling and it is for the federal administrative agencies created under the Interstate Commerce Act to apply the law requiring those special duties, if any, rather than state courts; and second, because the federal law imposes on carriers no duties infringed by collective bargaining agreements pro-

viding for respect of picket lines. The applicable decisions of the Interstate Commerce Commission and the courts under the Interstate Commerce Act establishing both pre-emption by federal law and the validity of a carrier's policy of permitting its employees to respect picket lines, are collected and discussed in Point II, pp. 73, 80-82, 85-87, *infra*.

No plausible reason suggests itself for permitting the state of Kentucky to read into the National Labor Relations Act, as amended, exceptions in favor of state imposed duties of common carriers. This Court has refused to allow the State of Wisconsin to create an exception to the national labor policy in a case involving the possibility of great local distress. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383. In striking down the Wisconsin statute depriving employees of public utilities of their right to strike, this Court said (at 391):

> "Second. The Wisconsin court sought to distinguish *United Auto Workers* v. *O'Brien*, supra, on the ground that the industry to which Michigan applied its notice and strike-vote provisions was a national manufacturing organization rather than a local public utility. Congress drew no such distinction but, instead, saw fit to regulate labor relations to the full extent of its constitutional power under the commerce clause, *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607 (1939). • • • No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the federal act • • • Creation of a special classification for public utilities is for Congress, not for this court."

Surely the obligation of a public utility to furnish either transportation, light, or power uninterruptedly to the entire community is at least of equal rank with the obligation of a common carrier to transport freight to a particular consignee.

The effect upon a community of an interruption in service furnished by a public utility would certainly be more

disruptive of the welfare of the community than the refusal of employees of a common carrier to make a direct delivery to a strike-bound plant.

Respondent in its Response to the Petition for Writ of Certiorari seems to place special emphasis on the fact that the injunction does not prohibit the employees of common or contract carriers from engaging in a strike against their employer, but only from refusing to serve one customer while serving all others. We fail to see how such attempted distinction has any validity. It could just as well have been argued in *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, that public utility employees could not strike a branch power house serving one part of the community unless they strike the main power house and all other branches as well.

3. The injunction issued by the Kentucky courts fell within the area regulated by the Labor Management Relations Act.

From the foregoing description of the detailed and complete regulation of picketing and related activities of just such employees as those here involved, in which the National Labor Relations Board and the federal courts are daily engaged, it is apparent that the Kentucky courts have issued an injunction within the field of federal regulation. The decision which the Kentucky courts made with respect to whether American Tobacco was an ally of American Suppliers or a neutral (R. 30-31, 96-98), involves an issue regularly decided by the Board and the courts (see cases cited, pp. 26-27, *supra*). The same is true of the issues with respect to whether picketing of American Tobacco was primary or secondary (cf. R. 28-30, 95-96, 99 with cases cited, pp. 27-31, *supra*); and whether the collective bargaining contracts between the carriers and the Teamsters Union permitting employees to respect picket lines and to refrain from handling unfair goods was valid (cf. R. 102-103 with cases cited, pp. 36-37, *supra*).

In addition to these issues the Board would also have inquired as to whether Local 89 was directing its inducement not to handle unfair goods to the carriers and their managerial or supervisory employees or was achieving carrier cooperation only by inducing concerted work stoppages or threats thereof by its employees (see cases cited, pp. 34-36, *supra*).

And finally the Board would have considered whether the refusal to cross the picket line was within the protection of the proviso to Section 8(b) of the Act, as amended, namely, was it a refusal to enter the premises of an employer whose employees were conducting a strike approved or ratified by a union which was the duly authorized bargaining agent of the striking employees (see cases cited, pp. 31-33, 37, *supra*).

The latter two questions seem to have received no consideration by the Kentucky court, although under federal law they might have been determinative of whether Local 89's conduct would have been protected by the National Labor Relations Board or would have been prohibited.

We believe there can be no doubt that the Kentucky courts' decision operated in a field regulated by the Labor Management Relations Act.

4. The Kentucky courts were without jurisdiction to issue an injunction which invaded the field regulated by the Labor Management Relations Act.

Once it appears that the Kentucky courts have issued an injunction which regulates the same conduct as is governed by the Labor Management Relations Act, it is clear that the injunction is to that extent beyond the powers of Kentucky. For it is established beyond question that the Labor Management Relations Act preempts so much of labor law as it regulates. *Bethlehem Steel Co.* v. *New York Labor Board*, 330 U. S. 767; *La Crosse Telephone Corp.* v. *Wisconsin Board*, 336 U. S. 18; *Wisconsin Board* v. *Plankinton*, 338 U. S. 953; *International Union* v. *O'Brien*, 339 U. S.

454; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383; *Garner* v. *Teamsters*, 346 U. S. 485; *Building Trades* v. *Kinard*, 346 U. S. 933.

The situation in the instant case clearly falls within the rule. Local 89 had been certified by the National Labor Relations Board as the exclusive bargaining representative of the employees of American before they went out on strike to enforce bargaining demands after a stalemate was reached. As an incident to this strike, picket lines were established around the struck premises. Truck drivers employed by interstate common, contract or private carriers refused to make deliveries to or pick-ups from the struck premises because of the picketline.

Although the state was without jurisdiction to interfere with either the strike or the picket line in any manner (absent violence, breaches of the peace or other unlawful means falling within the ordinary police powers of the states) it did, by injunctive process, compel members of the same union who were employed by common carriers to cross the picket line established by their striking co-members. This action by the state court was based on a complaint which alleged that Local 89 and its members were engaged in an unlawful secondary boycott (R. 4-7). If these allegations of the complaint were true, Local 89 would have been engaged in conduct falling within the proscription of the National Labor Relations Act. (See cases cited p. 28, *supra*).

Thus, on the face of the complaint, then, here, as in the *Garner* case, the respondent could have presented its grievance to the National Labor Relations Board; here, as in the *Garner* case, the duty of primary decision lay with the Board and the grievance was not subject to litigation in the tribunals of the State. 346 U. S. 485 at 501.

That the state court subsequently found the picketing to be primary, and hence lawful, while other conduct was found to be unlawful is, under the law, immaterial. Since the state court had no jurisdiction to proceed in the first

instance, the proceedings should have been dismissed at the threshold and were, therefore a nullity. *Garner* v. *Teamsters*, 346 U. S. 485; *Building Trades Council* v. *Kinard*, 346 U. S. 933; *Capital Service, Inc.* v. *NLRB*, 347 U. S. 501; *WERB* v. *Plankinton*, 338 U. S. 953. It is not the ultimate decision which controls but the nature of the allegation of the complaint and the relief requested.

This case fulfills the prediction of the Court in the *Garner* case, that "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudication as are different rules of substantive law." 346 U. S. 485, 491.

Accordingly, regardless of the ultimate basis for the state court decision, and regardless of whether the Board might have reached the same result, since the Kentucky courts have intruded into the domain of labor-management relations which are the subject of federal legislation, the judgment is void under the provisions of Article I, Section 8, and Article VI of the federal constitution.

B. The injunction issued by the Kentucky courts conflicts with provisions of the Labor Management Relations Act.

Until the National Labor Relations Board and the federal courts have had an opportunity to consider the case it is, of course, impossible to know how they would have resolved the controverted issues of fact and law considered by the Kentucky courts. Nevertheless it is clear that if the Board had determined as the Kentucky courts did, that American Suppliers and American Tobacco were so enmeshed both geographically and financially as to be one employer (R. 30-31, 96-99), then the Board would likewise, as the Kentucky courts did, have regarded the picketing of the joint premises of American Suppliers and American Tobacco as primary picketing (R. 29-31, 95-99). Once it is determined that the situs of American Tobacco was primary in character then the restraints placed by the Kentucky courts upon members of Local 89 crossing the picket line conflict

with rights guaranteed by the National Labor Relations Act.

1. The injunction limits the collective bargaining power accorded to Local 89 and its members by the National Labor Relations Act, as amended.

The right to bargain collectively is the essence of the rights protected by the National Labor Relations Act. This right is dependent upon the right to strike (see p. 22, *supra*). But the right to strike involves more than a mere withdrawal of labor power. It carries with it the right to engage in those traditional incidents of a strike which are essential to its success. Of these, one of the most important is the right to picket. But this, too, is a meaningless gesture unless other employees are protected in the right to refrain from crossing picket lines. In the words of this Court, it is "traditional and permissible in a primary strike" for pickets at an industrial plant "to influence employees of a customer of the (picketed employer) not to cross the picket line." *NLRB* v. *Denver Building Trades Council*, 341 U. S. 675, 687.

The response of the customer's employees, particularly when they are members of labor organizations, to such an appeal for assistance is equally traditional. As the Court of Appeals for the Ninth Circuit has stated (*Printing Specialties Union* v. *NLRB*, 171 F. 2d 331, 334, certiorari dismissed, 336 U. S. 949):

> "The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is explicit. 'Respect our picket line and we will respect yours'."

So crucial to the success of a strike is the ability to picket and to respect the picket line, that an injunction which compels the crossing of a picket line, limits the right to strike, and hence the collective bargaining power of those

enjoined. As Judge Frank pointed out in *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 67-68 (C. A. 2):

> "The Taft-Hartley Act does not completely shelter neutrals—in this case, so-called, 'secondary employers.' If it did, strikes would often be hopelessly crippled."

Numerous economic authorities attest to the importance of picketing to bargaining power. Thus Orme W. Phelps, Introduction to Labor Economics (1950), page 485, states:

> "Picketing is the key to strike success. If the picketing is effective, the odds are that the strike will be won. If the picketing is unsuccessful, it is a good bet that the strike will be lost."

W. S. Hopkins, Labor in the American Economy (1948), page 207, states:

> "In order to keep the jobs open while the work is stopped, it becomes almost inevitable that the strikers inform both the public and potential takers of the jobs that a strike is in progress. This is why picketing is an integral part of virtually every strike. . . . Its primary purpose, of course, is to persuade other people not to enter the establishment as 'strikebreakers'."

Gordon S. Watkins, Labor Problems (1942), page 605, states:

> "Picketing involves the presence of striking workers or their union brothers who pace back and forth before the place of business of an employer considered 'unfair to organized labor,' in the hope of being able to persuade peacefully other workers not to work in the establishment, and customers not to do business there."

Neil W. Chamberlain, Collective Bargaining (1951), page 224, states:

> "In conjunction with a strike, the picket line demonstrates conclusively the existence of a labor 'movement' —a bond among unions— by the respect which it is accorded, by the refusal of members of other unions to cross it whether engaged in their personal or their employer's business. The picket line has acquired an

> almost religious significance to many union members, so that its violation takes on aspects of sacrilege and taints the offender."

In the instant case the injunction below severely curtailed the collective bargaining power of Local 89. Just how severe the curtailment is not clear from the record but that it was serious is obvious. The unit at American Suppliers for which Local 89 was certified by the National Labor Relations Board contained truck drivers (see unit description quoted footnote 4, p. 4, *supra*). Since American Tobacco normally got all of its tobacco from American Suppliers prior to the strike but claimed that after the strike began it got none from that source, it seems apparent that shipments in by common carrier to American Tobacco might well involve members of Local 89 in essentially strike breaking, i.e., hauling tobacco into American Tobacco which but for the strike would have been hauled in by truckdriver employees of American Suppliers on strike. Thus, the decree below, construed at its worst, may have compelled members of Local 89 to serve as strikebreakers, performing in effect the work of striking truck drivers also members of Local 89. The National Labor Relations Board and the courts have always held that an employee is protected against being compelled to serve as a strikebreaker. *Rapid Roller Co.* v. *NLRB*, 120 F. 2d 452, 460-461 (C. A. 7) certiorari denied, 317 U. S. 650; *United Biscuit Co.*, 38 NLRB 778, modified and enforced 128 F. 2d 771 (C. A. 7); *Pinaud, Incorporated*, 51 NLRB 235, 236; *Gardner-Denver Co.*, 58 NLRB 81.

It is obvious that if the effect of the injunction below was to compel members of Local 89 to act as strikebreakers it seriously curtailed the bargaining power of Local 89. In this respect it conflicted with the right to strike in the same manner as the Michigan anti-strike and the Wisconsin public utility statutes held unconstitutional as in conflict with the National Labor Relations Act, as amended, in

Auto Workers v. *O'Brien*, 339 U. S. 454, and *Bus Drivers* v. *Wisconsin Board*, 340 U. S. 383.

But the conflict is only less in degree and not in kind if the effect of the injunction was merely to require the delivery of goods to and from the premises of American Tobacco which would have been handled by common carriers even if there was no strike on the premises. For Congress intended that the power of a union to bargain collectively have behind it the power to conduct a strike accompanied by picketing which all employees may respect by not entering the premises on strike, regardless the type of duties which they may be asked to cross the picket line to perform. The proviso to Section 8(b) discussed on page 25, *supra*, manifests Congressional intent to encompass within the power of the union the right to back its collective bargaining demands by a strike which can properly use picketing which employees of customers of the struck premises may respect by refusing to cross the picket lines.

This is a valuable aspect of the right to strike. The inability of a struck employer to receive its usual delivery or pickup service may inflict such economic loss as to make it willing to accede to demands of the union to which it would never exceed but for this power of the union.

Not only was Local 89's bargaining power vis-a-vis American Suppliers drastically reduced by compelling members of Local 89 who were employed by the common carriers to cross the picket line, but the bargaining power of members of Local 89 who were employed by the common carriers was similarly reduced. Their inability to respect the picket line of their own Local weakened the Local. But more than that the competition of the lower rates or poorer conditions which the truck drivers employed by American Suppliers could compel would weaken their own position. And still further, the inability of members of Local 89 employed by common carriers to respect picket lines threatened them with a similar disrespect for their picket lines should they ever conduct a strike.

Finally, the injunction below forbade Local 89 from entering into any arrangement with any common carrier which would result in the common carrier failing to serve American Tobacco. Under the National Labor Relations Act, as amended, Local 89 and its members are protected in their right to appeal to employers and their supervisory and managerial employees not to do business with a struck employer (see cases discussed, pp. 34-36, *supra*). Here again the injunction drastically curtailed the economic power of Local 89 to bargain collectively with American Suppliers.

2. The injunction issued by the Kentucky courts deprives employees of rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

The right of members of Local 89 both to refrain from, and to induce others to refrain from, crossing the picket line established by Local 89 as the federally certified union at American Suppliers, is guaranteed by the National Labor Relations Act, as amended. This is so not only by virtue of the fact that such conduct constitutes assistance to the union and also other concerted activities for mutual aid and protection within the meaning of Section 7 of the Act, as amended (see cases cited, pp. 20, 31-32, *supra*). But it is also true because the proviso to Section 8(b) provides that none of the conduct removed from the protection of Section 7 shall result in excepting from that protection the right of every employee to refrain from entering on the premises of an employer against whom an authorized bargaining representative is conducting a strike (see cases cited, pp. 33, 36, *supra*).

Here the injunction issued by the Kentucky courts compels members of Local 89 against their wishes to enter upon the premises where Local 89 as the union certified by the National Labor Relations Board is conducting a strike. Hence the state order deprives members of Local 89 of rights guaranteed by federal law. The conflict here is even more clear and direct than that arising from the Florida

statute requiring business agents of unions to be licensed. But the latter conflict was deemed a sufficient basis upon which to declare the Florida statute unconstitutional. *Hill* v. *Florida*, 325 U. S. 538, 541-542.

Indeed the effect of the injunction below, is to deprive each employee of the carriers of his right to refuse to cross a picket line when he is on his own time and to permit his discharge for such refusal. Since by the terms of their employment, members of Local 89 employed by carriers were not required as part of their duties to cross picket lines, whenever they refused they were properly acting on their own time and outside the scope of their employment. Cf. *Pittsburgh Plate Glass Co.*, 105 NLRB 740, 744, and *Madden* v. *Local 442, Teamsters Union*, 114 F. Supp. 932, 938 (W. D. Wis.) holding that collective bargaining clauses exempting handling of unfair goods constitute a definition of job to exclude such duties. Since this type of work is outside the scope of employment, the employees have no duty to perform it, and hence their refusal cannot be considered subordination, nor a strike in whole or in part, nor an activity for which they could be discharged, nor a refusal to work while on working time.

This is an activity similar in effect to activities engaged in during non-working hours,[12] and "an employee is of

[12] Section 7 protects concerted activities engaged in during non-working hours because their purpose is "mutual aid or protection," *e.g.*, appearance of employee representatives before a legislative committee (*Bethlehem Shipbuilding Corp.* v. *NLRB*, 114 F. 2d 930 (C. A. 1)); consultation during lunch hour over discharge of fellow employees *Ozark Hardwood Co.*, 91 NLRB 1443, enforced 194 F. 2d 963 (C. A. 8); discussions with fellow employees relating to the need for union organization (*Root-Carlin*, 92 NLRB 1313); planning a dinner meeting to discuss demands to be made on the employer (*Coca-Cola Bottling Co.*, 97 NLRB 151); circulating a petition designating the circulator as agent to collect back pay owing (*Salt River Valley Water Users Assoc.*, 99 NLRB 849); union meeting (*Kelco Corp.*, 79 NLRB 759, reversed on other grounds, 178 F. 2d 578 (C. A. 4). The Board has also held that union business customarily done during the non-business hours must be done at that time or lose its protection (*Gulf Coast Oil Co.*, 97 NLRB 1513).

course free to exercise his right to refuse to cross a picket line when he is on his own time, and his discharge for so doing would doubtless be a violation of Section 8(a)(1)." *NLRB* v. *Rockaway News*, 197 F. 2d 111, 113 (C. A. 2).

But the injunction below has the effect of compelling carriers to discharge employees for refusing to cross the picket line and prohibits Local 89 from interfering with such discharges. In the contempt proceedings it appeared such a discharge had in fact occurred and Local 89 had felt compelled not to interfere (R. 19-20).

So direct is the interference of the Kentucky court in the rights of employees protected by Section 7 of the National Labor Relations Act, as amended, that the conduct of American Tobacco in securing the injunction may have constituted an unfair labor practice under Section 8(a)(1). In dissolving a similar state court injunction the District Court in *Overton* v. *Teamsters Union*, 115 F. Supp. 764, 770 (W. D. Mich. S. D.) said:

> "The practical effect of this injunction is to compel the employees of the defendant common carriers, who are members of the defendant Teamsters' Unions, to cross the picket lines established at the plaintiff's factory by the members of the Upholsterers' Union, which is not a defendant in this case.
>
> "Therefore, under the decision of the National Labor Relations Board in the Carter case, from which I quoted, it might be argued with some force that the act of the plaintiff company in obtaining the State-court injunction would constitute an unfair labor practice by such employer under Sec. 8(a) of the Act, in that it interferes with the rights of the members of the Upholsterers' Union under Sec. 7 of the Act."

In *Carter & Bro.*, 90 NLRB 2020, 2026, to which the court referred in the above quotation, the National Labor Relations Board held that an employer committed an unfair labor practice within the meaning of Section 8(a)(1) of the National Labor Relations Act by obtaining an injunction from a Texas state court which deprived employees of rights

guaranteed to them by the National Labor Relations Act. The Board said (at 2026):

> "In addition, a direct consequence of the Respondents' unfair labor practices was the issuance at the Respondents' request of a still outstanding injunction which, in effect, prohibits any union meeting on the Respondents' property except with the Respondents' consent. In view of the serious consequences that flow from violation of a court order, this injunction continues to represent a correspondingly serious impediment to the free exercise of rights guaranteed under the Act, as herein found. We shall, therefore, in order to cure the effects of the Respondents' unfair labor practices in this connection, and in order to effectuate the policies of the Act, order the Respondents to request the court to vacate the injunction, or to appropriately modify the injunction in conformance with our Decision and Order herein." (Footnotes Omitted.)

3. The injunction renders invalid provisions in collective bargaining contracts between Local 89 and common carriers which are valid under the National Labor Relations Act, as amended.

Highly significant, and demonstrative of the degree of conflict between Kentucky law and the Federal law, is the action of the Kentucky courts in casting out, as a nullity, a contract provision between Local 89 and the common carriers which reads as follows (R. 21):

> "It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods. The term unfair goods, as used in this section includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at whose terminal or terminals or place of business there is a controversy between such carrier or its employees on the one hand and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled, or used by the

interchanging of succeeding carriers whether parties to this Agreement or not, until such controversy is settled."

Local 89 relied upon the language of this clause as permitting the action taken by the employees of the carriers. The Kentucky Court of Appeals, however, declared: "Such a contractual stipulation is void" (R. 103).

Yet precisely the same type of clause was held valid and bargainable in *Teamsters Union (Rabouin)*, 87 NLRB 972, 982, enforced, 195 F. 2d 906 (C. A. 2); *Teamsters Union (Arkansas Express)*, 92 NLRB 255; and the identical clause was sustained in *Pittsburgh Plate Glass Co.*, 105 NLRB 740, and as recently as December 16, 1954, in *Teamsters' Union (McAllister Transfer, Inc.,)* 110 NLRB No. 224, 35 LRRM 1281.

In all of the above cases the question was presented whether what would otherwise be "secondary" activities involving common carriers would be immune from remedial action by the Board because of the presence of the contractual stipulation. In each case the Board rejected the argument that such contract clause violated any provisions of the Act or demand of legislative history or public policy.[13] Similar holdings were made by federal District Courts whose jurisdiction was invoked under Section 10(1) of the Act: *Madden* v. *Local 442, Teamsters Union*, 114 F. Supp. 932, 937-938 (D. C., Wis.); *NLRB* v. *Lodge 850, A. F. of L. Machinists and Local 880, A. F. of* ., E. D. Mich., October 16, 1954. Likewise the only federal court to consider such contracts in a suit brought under Section 303 of the Labor

[13] It is pertinent to note that in each instance that questions involving this type of clause came before the Board, it was in the context of activities of employees of common carriers refusing to deliver freight to, or pick-up or accept freight from, a particular shipper, consignee, or freight line because of a labor dispute involving such shipper, consignee or freight line. In the last of such instances to come before the Board *(McAllister, supra)* the Board's precedents in the matter were sharply criticized and attacked in a brief filed by the American Trucking Associations, but the Board held to its principle.

Management Relations Act to recover damages from unions for alleged secondary boycotting activities which deprived a primary employer of the pick up and delivery services of common carriers, ruled such contracts were valid and a complete defense to the suit. *Meier & Pohlmann Furniture Co. v. Gibbons*, U. S. D. C. E. D. Mo. E. D., January 10, 1955.

Finally, this Court has expressed its view that the proviso to Section 8(b)(4) "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree." *NLRB v. Rockaway News Supply Co.*, 345 U. S. 71, 80.

It is clear then, that the type of clause which the State Court cast out as contrary to state policy falls within the area of permissible collective bargaining under the Act.[14]

But under the Kentucky court's decision here, both the demand and the resulting agreement are barred because of the alleged requirements of state law or policy.

The situation thus parallels that which was before this Court in *Bus Employees v. Wisconsin Board*, 340 U. S. 383. There this Court was confronted with a Wisconsin statute which precluded the granting by a board of arbitration of certain union demands which were proper subjects of collective bargaining under the Federal Act. This circumstance was described by the Court as an example of "situations in which application of the Wisconsin Act would work at cross-purposes with other policies of the National Act" and hence one of "direct conflict" (at 398).

The analogy between the cases is exact. The state action here, no less than in *Bus Employees, supra*, causes a forfeiture of bargaining rights of members of Local 89 and a release of obligations of their employers in contravention of the Congressional scheme and in derogation of superior constitutional power.

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[14] Particularly since, as the Board pointed out in *Pittsburgh Plate Glass*, 105 NLRB 740, such clause merely defined their job duties. To the same effect see *Madden v. Local 442, Teamsters Union*, 114 F. Supp. 932, 938 (W. D. Wis.).

In *Overton* v. *Teamsters Union*, 115 F. Supp. 764, 770 (W. D. Mich. S. D.), the court in vacating the Michigan state injunction, after pointing out that the conduct of the employer in securing the injunction probably constituted an unfair labor practice because its provisions directing employees to cross picket lines interfered with rights guaranteed by the National Labor Relations Act (see p. 56, *supra*), also stated that similar interference ensued from the injunction's implicit invalidation of picket line clauses in contracts with carriers. In this respect the court said (at 770):

> "From the record of the trial in this court in Civil Action 2254, it appears that there are certain contracts between the defendant Teamsters Unions and the common carriers which are defendants in the present case, which contracts provide in substance that the employees of the carriers who are members of the Teamsters' Unions should not be required to handle goods sent to or from a strike-bound plant. In view of these contracts, it might well be argued that the State-court injunction which the plaintiff has obtained in the present case would seriously interfere with the rights of the defendant unions and the defendant carriers under their respective contracts. See the cases of *Rabouin d/b/a Conway's Express*, 87 NLRB 792; and *Pittsburgh Plate Glass Co.*, 105 NLRB No. 120."

4. Kentucky's interest in requiring a common carrier to serve all customers without discrimination does not afford any basis for its intrusion upon federally protected rights of employees of either the carriers or their customers.

Any argument that the Kentucky courts were here operating in the field of transportation law rather than labor relations ignores the parties who were before the court, the issues posed and the terms of the injunction issued. No carriers were parties to the suit. Insofar as the record shows no demand that they meet their duties as common

carriers was made upon them by shippers, consignees or state regulatory agencies. There is no showing that the carriers could not have fulfilled any common carrier duties in some other manner. Each of the carriers here involved had hired the members of Local 89 on terms which excluded the work of crossing picket lines from the scope of employment.[15] The State of Kentucky has undertaken to revise the scope of each employee's job, so as to include therein duties he was never hired to perform.

Furthermore, the Kentucky courts do not insist that employees of common carriers have an absolute duty to go through picket lines of a customer. Rather Kentucky insists that the only way for employees to exercise their right to refuse to go through a picket line at the premises of one shipper is to refuse to perform any services for all other shippers. In other words, the employees may engage in a complete cessation of work, but may not accord respect for picket lines as such.

We have already discussed (p. 39, *supra*) the intent of Congress, manifested by Section 10(a) of the Act, as amended, to exclude the states from any regulation of labor relations in the transportation industry. Congress by that section expressly refused to permit any cession to the states of control of labor relations in "transportation except where predominantly local," even where the states were administering state laws consistent with federal law.

[15] The carriers for reasons best known to themselves had contracted to permit members of Local 89 to refrain from performing any of the duties which the Kentucky court now requires them to perform as employees of the carriers. The record (R. 50) indicates that the carriers in entering into these collective bargaining agreements with Local 89 thereby established a practice of not holding themselves out for service through picket lines, a practice valid under current decisions of the Interstate Commerce Commission (see pp. 85-86, *infra*). However, without so limiting the services offered, the carriers might have believed that by some arrangement with supervisory staff, other carriers or other drivers, service through picket lines could be maintained without utilizing members of Local 89. For other suggested alternatives see Note, 67 Harvard Law Rev. 317.

We have also discussed (pp. 45-46, *supra*) this Court's rejection of Wisconsin's claim that public utility operation was so critical to the state as to warrant its Anti-strike Statute. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383.

Subsequent to this Court's decision in *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, holding the Wisconsin Public Utility Anti-Strike Statute invalid both the Board and the courts, state as well as federal, have had numerous occasions to reject state anti-strike statutes involving either a public utility or other industry deemed critical by the state. *Wheatland Electric Coop.*, 102 NLRB 1119 enforced 208 F. 2d 878 (C. A. 10), certiorari denied, 347 U. S. 966 (Kansas Statute prohibiting strikes in public utilities does not justify discharge); *Henderson* v. *Florida*, 65 So. 2d 22 (Florida Sup. Ct., 1953, holding Florida Public Utility Arbitration Law in conflict with Labor Management Relations Act); *Marshall* v. *Schricker*, 28 LRRM 2167 (Ind. Cir. Ct., 1951, same respecting Indiana Public Utility Anti-Strike Act); *Consolidated Vultee*, 108 NLRB No. 95 (Texas statute limiting nurses to representation by unions whose constitution forbids strikes invalid as applied to industries subject to National Labor Relations Act).

The same considerations which impelled the foregoing decisions that the states are precluded from preventing total interruptions in all industries, no matter how critical to the state, must also impel the conclusion that the state may not prohibit a partial interruption which is a concerted activity within the protection of Section 7.

Obviously the injury to the public generally and to neutrals would be greater from a total strike of a common carrier than from only the refusal to serve the immediate primary employer whose employees are involved in a dispute protected by the federal act. Hence every consideration of policy and reason which forbade a state from prohibiting a total cessation of operations requires that a state order forbidding merely a partial failure of performance be likewise held beyond the state's power where it conflicts with Federal law.

But assuming that the State of Kentucky was applying its state policies concerning the duties of common carriers rather than labor relations law, the decision of the Kentucky courts does not thereby become any less an intrusion upon federally protected rights.

The power of the Federal Government to achieve the objectives of the National Labor Relations Act, as amended, would be seriously hampered were the states free to apply state laws which, though designed to deal with non-labor relations problems, had the effect of depriving employees of rights guaranteed by the federal labor laws. The great variety and extent of such state laws possible, were states accorded this power, is obvious. Federal regulation would be fragmentary and piecemeal in character were states free to superimpose such regulation ahead of federal law. Illustrative is *Hazen & Jaeger Funeral Home*, 95 NLRB 1034, 1036, 1046-1047, enforced 203 F. 2d 807 (C.A.9), where the employer relied upon a Washington State statute entitled "Interfering With a Dead Body or Funeral" as illegalizing all picketing of funeral homes. The Board held that if the picketing did violate this Washington statute, the federal law was paramount.

If Congress has protected the Union activity which the state has forbidden, then the state legislation must yield. *Auto Workers* v. *O'Brien*, 339 U. S. 454.

Any other test merely begs the question and would place the answer to federal supremacy on the ingenuity or resourcefulness of the pleader, or the particular state law upon which the state tribunal choses to rest its decision.

Here the state is dealing with concerted activities of a particular type of employees; it is dealing with those activities in connection with a labor dispute to which those employees are parties[16]; it seeks to impose upon those employees a greater obligation to the public than employees in other industries; and requires them to cease engaging in

[16] The members of Local 89 are employees under Section 2(3) of the National Labor Relations Act, as amended, and are involved in a labor dispute under Section 2(9) of that Act.

certain activities which, under federal law, all other employees may engage in.

To say that the state may do this without unlawfully depriving employees of rights assured by federal law merely because the basis for the restraint is found in general legislation dealing with common carriers rather than specific "labor legislation" would be to sanction a device by which the principle involved becomes a nullity.

It is clear above all else that basically and essentially the state regulation here is based upon the type of employee involved, not the type of activity. The complete answer to such attempted distinction is *Bus Drivers* v. *Wisconsin Board*, 340 U. S. 383.

Finally, since all of the carriers involved appear to have been engaged in interstate transportation (R. 6, 12, 27, 38, 41, 42, 51, 52, 53, 58), the state law respecting their common carrier duties is immaterial. These duties were governed by the Interstate Commerce Act, and as we shall show hereinafter, that Act, as interpreted by the Commission, imposes no duties on carriers inconsistent with the Labor Management Relations Act (see pp. 85-88, *supra*). But if it did, it would be for the federal agencies rather than the state to reconcile any inconsistency and to apply the dominant federal policy.

II.

The Interstate Commerce Act precludes Kentucky from applying its laws, defining the duties of a carrier, to require employees of common and contract carriers engaged in interstate transportation, to receive and deliver property through a valid picket line established at the plant of a consignee or shipper, where the carriers and their employees have a collective bargaining agreement, permitting respect for picket lines and non-handling of unfair goods, which has never been held invalid by the Interstate Commerce Commission.

Federal law has preempted the regulation of the duty of interstate common carriers by motor vehicle to serve with-

out discrimination. The provisions of the Interstate Commerce Act not only provide the substantive rule applicable but vest the Interstate Commerce Commission with exclusive primary jurisdiction to determine whether any practice of such a carrier constitutes unjust discrimination. The Interstate Commerce Commission has considered various aspects of the duty of common carriers to furnish strike-bound customers with pick-up and delivery service. It has held that carriers may properly define the type of customers they are willing to serve so as to exclude any holding of themselves out as willing to serve consignees or shippers whose premises were picketed. *Pick Up Delivery Restrictions in Official Territory*, 269 I.C.C. 191, 192, 193. It has held that carriers may enter into and comply with collective bargaining contracts permitting respect for picket lines. *Montgomery Ward* v. *Consolidated Freightways*, 42 M.C.C. 225. The decision of the Kentucky courts thus not only intrudes upon the exclusive primary jurisdiction of the Interstate Commerce Commission but also applies a rule of law in conflict with applicable decisions of the Commission.

A. Kentucky state law respecting common carrier duties to serve without discrimination.

Although no common carrier was a party to the instant suit, the Kentucky courts based their decision expressly on "the legal duty of a common carrier to handle the merchandise of a shipper without discrimination" (R. 102-103). The Kentucky courts held that the existence of a picket line at the place of business of a customer afforded no reasonable basis for denying him exactly the same service as was afforded the non-picketed customer. They based this decision on their interpretation of the Kentucky state constitution, the Kentucky common law and Kentucky statutes (R. 99). The decisions below do not purport to apply the rules established under the Interstate Commerce Act despite the admittedly interstate character of most, if not all,

of the common carriers whose employees were ordered to cross picket lines to deliver goods to and from American Tobacco (R. 6, 12, 27, 38, 41, 42, 51, 52, 53, 58). No distinction was made in the decree between common carriers subject to the Interstate Commerce Act and carriers involved in purely intrastate operations.

The Kentucky courts held that the Kentucky law imposed the duty to serve all customers without discrimination on the common carrier's employees as well as on the common carrier (R. 99). The Kentucky courts held that any contract by which a carrier exempted any of its employees from the duty to serve any customer was in conflict with Kentucky law and hence void (R. 103). No recognition was given to the fact that a carrier might desire to hire union employees who would not accept employment without contractual assurance that their duties would not include crossing of picket lines or handling of unfair goods. No recognition was given to the fact that a common carrier hiring employees on such a basis may hold itself out as serving only non-picketed customers. Of course, if the type of customer which a carrier holds itself out to serve does not include picketed customers, a carrier is not violating his implied offer to serve by declining service across a picket line. Cf. *Pick Up Delivery Service in Official Territory*, 269 I.C.C. 191, 192. No consideration was given to the fact that the carriers might have available to them alternative methods of serving the picket-bound customer which would not compel union members to cross picket lines against their wishes.

The decision was not based on any facts peculiar to American Tobacco. Rather the Kentucky courts based their decision on their interpretation of Kentucky law as requiring common carriers to serve strike bound or picketed customers. The decision hence purports to be a broad decision of the duty of common carriers to serve strike bound or picketed customers. Likewise it is apparent that Kentucky was not holding the picketing and unfair goods clauses of

the collective bargaining agreements merely inapplicable to excuse refusal of service to American Tobacco. Rather the contractual provisions permitting respect for picket lines and non-handling of unfair goods were held void (R. 103).

The adjudication of the Kentucky courts thus assumed the character of a broad determination that the practice of common carriers to refrain from requiring their union members to serve strike-bound or picketed customers was a violation of their duties as common carriers under Kentucky law.

B. The applicable provisions of the Motor Carrier Act

Under the federal Motor Carrier Act of 1935, (49 U.S.C. 301, *et seq.*) initial exclusive jurisdiction to determine whether an interstate common carrier violates a duty to make and accept deliveries without discrimination by a practice of not making such deliveries where his employees respect picket lines established at a customer's premises is lodged in the Interstate Commerce Commission, which body has in fact, as will be discussed later, taken jurisdiction to determine the precise question involved here on various occasions. To permit the various courts in the forty-eight states to attempt such determinations would work confusion and destroy uniformity in a field where uniformity and clarity is indispensable to the proper functioning of motor vehicles in channels of interstate commerce and where Congress has specifically provided that the Interstate Commerce Commission, as the federal body expert in the field, make such determinations, and such determinations have, as a matter of administrative practice, been made.

Section 216(b) of the Motor Carrier Act (49 U.S.C. 316(b)) states that it shall be the duty of every common carrier by motor vehicle to establish and observe just and reasonable regulations and practices relating to the manner

and method of delivering property for transportation.[17]

Section 216(d) of that Act (49 U.S.C. 316(d)) specifically makes it unlawful for any common carrier by motor vehicle engaged in interstate commerce to subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[18]

Section 216(e) (49 U.S.C. Sec. 216(e)) confers jurisdiction upon the Interstate Commerce Commission, upon complaint of any person or on its own complaint, to determine that any rule, regulation or practice of any common carrier by motor vehicle is in violation of subsection 216(b) or (d), and to prescribe the lawful rule, regulation or practice thereafter to be made effective.[19]

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[17] "Sec. 216(b). It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

[18] "Sec. 216(d). . . . It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . ."

[19] "Sec. 216(e). Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such . . . classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any . . . classification, rule, regulation, or practice whatsoever of such carrier or carriers . . . is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the . . . lawful classification, rule, regulation, or practice thereafter to be made effective. . . ."

Section 222 of the Motor Carrier Act of 1935 (49 U.S.C. 322) provides criminal penalties for violation of the Act and permits the Commission to apply to the District Courts of the United States for enforcement of the Act.

Finally, the National Transportation Policy, as adopted by Congress in 1940 which constitutes an amendment to the Interstate Commerce Act (49 U.S.C., preceding Sections 1, 301, 901 and 1001) makes very clear that it is the policy of Congress to provide for fair and impartial regulation of all modes of transportation subject to the Act, and to eliminate unjust and undue preferences or advantages, all to the end of developing, coordinating and preserving a uniform national transportation system by water, highway and rail.[20]

C. The prevention of discriminatory practices as the chief objective of the Interstate Commerce Act.

It is apparent from the foregoing that the Motor Carrier Act specifically makes unlawful any practice of discrimination whatsoever by carrier by motor vehicle and confers exclusive jurisdiction upon the Commission initially to

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[20] "**National Transportation Policy**

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

determine whether any alleged discriminatory practice violates the Act. Indeed, the prevention of discriminatory practices has been held repeatedly by this Court to be the key purpose of those sections of the Interstate Commerce Act.[21]

In *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740 this Court stated (at 749-750):

> "The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. Senate Report No. 46, 49th Cong. 1st sess., p. 215. See *Kansas City S.R. Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 597. This Court has said that the language of the Act 'is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.' *The Shreveport Case*, 234 U. S. 342, 336."

In *United States* v. *Baltimore & Ohio R. Co.*, 333 U. S. 169, it was stated (at 175):

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types, *New York* v. *United States*, 331 U. S. 284, 296, and

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[21] While the decisions hereinafter discussed relate mainly to that portion of the Interstate Commerce Act regulating railroads, those same provisions have their exact counterparts in the Motor Carrier Act. Thus, the counterpart of Section 216(b) is Part I of the Interstate Commerce Act, Sec. 1(4)(11). Counterpart of Section 216(d) is Part I of the Interstate Commerce Act, Sec. 1(5), Sec. 2, and Sec. 3(1). Counterpart of Section 216(e) is Part I of the Interstate Commerce Act, Secs. 13 and 15(1). See *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337, 341, for a determination by the full Interstate Commerce Commission that provisions of the Motor Carrier Act of 1935 were intended to be the counterpart of similar sections relating to common carriers by railroad, and that the decisions and principles applicable to comparable provisions of Part I of the Interstate Commerce Act relating to railroads are determinative in construing the comparable provisions of the Motor Carrier Act.

language of the broadest scope has been used to accomplish all the purposes of the Act."

See also *New York* v. *United States*, 331 U. S. 284, 296.

D. Controlling court decisions respecting the exclusive primary jurisdiction of the Interstate Commerce Commission.

For almost half a century the principle has been firmly established that where Congress has made specific activities of common carriers in interstate commerce unlawful and has conferred jurisdiction upon the Interstate Commerce Commission to determine whether violations of duties and obligations imposed by congressional enactment have taken place, the state common law and state statutory rights and remedies are thereby superseded, so that initial resort must be had to the Interstate Commerce Commission to establish whether such violations do in fact exist. The leading case is *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, where this Court held that Texas state courts were without jurisdiction to award a shipper damages on the ground that a rate posted in a tariff as provided by the Interstate Commerce Act was unjust or unreasonable where there had been no prior ruling by the Interstate Commerce Commission holding it unjust or unreasonable. This Court said (at 440):

". . . Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the Act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power

existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of the Court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

The *Abilene* case disposed of the contention that Section 22 of the Interstate Commerce Act (49 U. S. C. 22)[22], which finds its counterpart in the Motor Carrier Act under Section 216(j) thereof and which preserves common law remedies,[23] operates to permit resort to the state courts to enforce what the Kentucky Court of Appeals has found to be a common law duty. This Court speaking of Section 22 said (at 446):

"This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

Applied to the instant case, Section 206(j) could have no force until after primary resort to the Interstate Commerce Commission. For the practice in the instant case, which was challenged in the Kentucky courts as discriminatory,

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[22] "Sec. 22. . . . nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies;"

[23] "Sec. 216(j) (49 U. S. C. 316 (j)). Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

may likewise be submitted to the Interstate Commerce Commission for a ruling on its legality. If the Commission should determine that the practice is illegal, then an effort to invoke common law remedies might bring Section 22 or Section 206(j) into play. But until such determination has been made by the Interstate Commerce Commission it cannot be said, without destroying the uniformity which the Act seeks to achieve, that rights as well as remedies can be adjudicated in the state courts.

A case which is entirely analogous, and which compels the view that the practice complained of herein is one the legality of which must be initially adjudicated by the Interstate Commerce Commission, is that of *Midland Valley Railroad Company* v. *Barkley*, 276 U. S. 482. There, as here, the common carrier, through no fault of its own, was involved in a strike among its customers. The strike had caused a shortage of the more desirable open-top coal cars, and the railroad had allocated the open-top cars to various of its customers according to what the carrier considered a reasonable allocation under the circumstances. A customer who was supplied boxcars rather than open-top cars under this arrangement brought suit in the Arkansas state courts to recover damages for the alleged failure of the carrier to furnish during the period of the car shortage an adequate supply of open-top cars. The highest court of that state sustained a judgment for damages which had been awarded by the trial court and overruled the contention that the proper distribution of the cars under the circumstances was an administrative question which Congress had committed to the Interstate Commerce Commission, and that plaintiffs should have sought relief before that board. On appeal to this Court the plaintiffs below contended, as respondent does here, that the action was sustainable on the theory of a common law duty to furnish cars, which duty had been found to exist by the state court under a state statute; that Section 22 of the Interstate Commerce Act preserved such common law remedies; and that, finally, the suit involved

no attack upon any regulation or order of the Interstate Commerce Commission itself. There, as here, the plaintiff cited and relied heavily upon *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 227 U. S. 121, in support of its contention that no administrative question was involved. This Court, reversing, speaking through Justice Brandeis, made unanimous answer to these contentions as follows:

> ". . . The law exacts only what is reasonable from such carriers. The reasonableness of the rule adopted by the carrier is a matter for the Commission *Pennsylvania R.R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 133, 134, 59 L. Ed. 867, 873, 874, 35 Sup. Ct. Rep. 484. In the case at bar, the right of the plaintiffs to recover depended upon whether the defendant's practice of distributing its open top cars to tipple mines and its boxcars to wagon mines was reasonable. . . ."

It is respectfully submitted that the foregoing decision is dispositive of the issues in this case. There, as here, the particular practice complained of was occasioned by a strike situation in which the carrier was not involved and which was beyond its control. There, as here, because of such strike situation the carrier was obliged to make a rearrangement of its shipping practices. Whether such rearrangement was a reasonable one under all of the circumstances was held to be a question exclusively for the Interstate Commerce Commission to determine. While there the alleged breach was a common law duty to furnish cars, and here the alleged breach is a common law duty not to discriminate, in both instances the ultimate question was the reasonableness of the particular practice engaged in. In both cases we have involved a practice applied generally to all customers, a determination respecting which would govern the future actions of the carrier. An adjudication in this respect clearly involves the exercise of the regulatory function of the Commission. There is no distinction in principle between the circumstances involved in the *Midland Valley*

R. R. Co. case and the circumstances involved in the present case.

Another closely analogous decision is that of this Court in *Baltimore & Ohio R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481. As in the *Midland Valley* case, the practice of the carrier which was complained of involved a regulation adopted by the carrier for the distribution of coal cars in times of car shortage. Likewise, in the *Pitcairn Coal* case the practice was challenged as being discriminatory. However the suit was for mandamus to put an end thereto and was instituted in the Federal District Court without prior resort to the Interstate Commerce Commission. The United States Court of Appeals for the Fourth Circuit held that there was power in the District Court to consider the subject matter and award the relief prayed without prior resort to the Interstate Commerce Commission. In reviewing, this Court held as follows.[24]

> ". . . When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint to it, the opportunity to exert its administrative functions."

Again it would appear that the principles enunciated above are entirely applicable to the present case where the practices involved are also complained of as being in violation of the carrier's duty not to discriminate. In essence, a determination of whether the practice of the carrier in the instant case in respect to making pickups and deliveries on strike-bound premises was discriminatory or not depends, as we have seen, upon the reasonableness of the

[24] Incidentally, the Court indicated that it could and would consider this question even without assignment of error, the issue going to the power of the court to consider the subject matter at all.

refusal under the circumstances. Such questions of reasonableness respecting practices of carriers in interstate commerce are peculiarly for the Interstate Commerce Commission to determine.

In *Northern Pacific R. Co.* v. *Solum*, 247 U. S. 477, a suit for damages in the Minnesota state courts, the question was whether a carrier had a duty to ship by the cheaper of two routes. This Court, speaking through Justice Brandeis, held there was no absolute duty so to ship, that whether the carrier's practice in this respect was discriminatory or otherwise unlawful depended upon the reasonableness of the practice in each case, and that this qustion of reasonableness was solely for the Interstate Commerce Commission to determine in the first instance. The Court stated as follows (at 482):

> "The railway contends that, since the administrative question upon which its liability depends involves the reasonableness of a practice in interstate commerce and the traffic actually moved in interstate commerce, the court had no jurisdiction to adjudicate the controversy until that administrative question had been determined by the Interstate Commerce Commission. The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate."

Mitchell Coal & Coke Co. v. *Pennsylvania Railroad Co.*, 230 U. S. 247, states the same concept even more forcibly. That case involved an action to recover damages because of alleged discriminatory rebates. This Court concluded that initial action before the Interstate Commerce Commission was mandatory since a determination of the legality of the practice involved a question of reasonableness. This Court stated (at 256-257):

"It is argued that this conclusion ignores Sections 9 and 22 which give the shipper the option of suing in the courts or applying to the commission. The same argument was made and answered in the *Abilene* case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. • • • But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such case the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

Other cases in support of the proposition for which Local 89 here contends are numerous. Especially persuasive, however, are the following: *Robinson* v. *Baltimore & O. R.*, 222 U. S. 506 (whether there was discrimination in a rate schedule held for sole and initial determination by the Interstate Commerce Commission); *Lewis, Simmis, Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (question of reasonableness of a joint through international rate held for initial determination by the Interstate Commerce Commission); *General American Tank Car* v. *El Dorado Terminal Co.*,

308 U. S. 422 (validity of a mileage allowance made by railroads for use of cars held for primary determination by the Interstate Commerce Commission even though the amount of the allowance had not been fixed by the Commission); *Armour & Co.* v. *Alton R. R.*, 312 U. S. 195 (question of whether a railroad must deliver shipments at such a location and in such a manner that shipper need pay no yardage charge held to involve administrative problems necessitating preliminary resort to the Interstate Commerce Commission on authority of the *Abilene* case); *United States* v. *Wabash R. R. Co.*, 321 U. S. 403 (question of whether a carrier's practice in spotting freight cars warrants a special charge held to be for initial determination by the Interstate Commerce Commission. The Court stated: "Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful.").

A recent expression by this Court of the general principle for which Local 89 herein contends was made in the case of *Garner* v. *Teamsters Union*, 346 U. S. 485. There, in discussing the distinction between "legal rights or duties enforced through the administrative process and those left to enforcement through private initiative through the law courts," it was stated (at 496-497):

> "Federal law has largely developed and expanded as public law in this latter sense. It consists of substituting federal statute law applied by administrative procedures in the public interest in the place of individual suits in courts to enforce common-law doctrines of private right. This evolution, sharply contested, and presenting many problems, has taken place in many other fields as well as in labor law. For example, the common law recognized a shipper's right to have a common carrier transport his goods for reasonable rates, and the right was enforceable in the courts. But this pri-

vate right proved too costly and sporadic to be effective as transport became a vast enterprise. As to interstate commerce, this right was superseded by the Interstate Commerce Act, which, in the public interest, authorized a public tribunal to prescribe reasonable rates and to award reparations for excessive ones. Of course, this put an end to private litigation in state and federal courts to determine, in the first instance, what rate for carriage is reasonable, although that Act did not expressly abolish the pre-existing private rights." (Footnotes omitted.)

The *Abilene* case was cited with approval.

A very recent decision, delivered by Mr. Justice Black for a unanimous court, which affirms the principles advanced by petitioners in this case is *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61. There, the question involved the power of a state to bar interstate motor carriers from use of state roads as punishment for repeated violations of state highway regulations. The question of conflict with the federal Motor Carrier Act was raised, and this Court held that the federal law operated to supersede state regulations interfering with the free flow of interstate commerce. In so holding, the Court stated (at 63-65):

"Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by Sec. 306 of 49 U. S. C. which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity."

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"Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-

granted right to operate. Cf. *Hill* v. *Florida*, 325 U. S. 538."

* * * * * * *

"It is urged that without power to impose punishment by suspension states will be without appropriate remedies to enforce their laws against recalcitrant motor carriers. We are not persuaded, however, that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor trucks. Moreover, a Commission regulation requires motor carriers to abide by valid state highway regulations. And as previously pointed out, the Commission can revoke in whole or in part certificates of motor carriers which willfully refuse to comply with any lawful regulation of the Commission. If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on complaint of the state." (Footnotes omitted.)

Two leading law review articles fully support the position for which Local 89 contends in this case. They are "Duty of Common Carrier to Cross Picket Line of Shipper's Employees to Receive Goods for Carriage," 67 Harv. L. Rev. 317 (1953), and "The Plight of a Strike-Bound Carrier," Charles H. Woods, 34 Minn. L. Rev. 255 (1949).

A leading—perhaps the leading—case in the state courts respecting the question of state versus federal jurisdiction in the field of interstate shipping is that of *New York Lumber Trade Association* v. *Lacy*, 154 Misc. 747, 281, N. Y. Supp. 647, affirmed *per curiam*, 269 N. Y., 595, 199, N. E. 688 and 200 N. E. 54, certiorari denied, 298 U. S. 684. There, several shippers brought an action against common carriers by steamship and various labor organizations alleging a conspiracy to discriminate against the plaintiffs by virtue of an understanding between these defendants that the carriers would not receive for shipment any merchandise delivered by non-union teamsters. It was alleged that this conduct or practice was in violation of state common law

forbidding discrimination by common carriers. The New York Supreme Court, Appellate Division, refused to issue the requested injunction which would have directed the carrier defendant to ship the goods of plaintiffs regardless of whether they were handled by union or non-union labor. In denying this injunction it cited the *Abilene* and other cases decided under the Interstate Commerce Act, and stated (281 N. Y. S. at 656):

> "It has been held, generally, that where complaint has been made of a rate or unfair practice, the Commission has jurisdiction in the first instance, despite the aforesaid sections, for, otherwise, uniformity of regulation would be lost, and furthermore, the alert suitor would gain an advantage over his competitors who did not dispute the ruling, rate or practice."

It found that the Shipping Act of 1916 with the Merchant Marine Act of 1920, were the counterpart of the Interstate Commerce Act, and established the same rule of primary jurisdiction. The New York Court rejected the plaintiffs' argument that the Shipping Act made no provision for relief against unions by stating (281 N. Y. S. at 661-662):

> "Respondents question the efficacy of the Shipping Act to furnish relief on the ground that it does not reach the union defendants, but simply relates to carriers. That is on the assumption that the Board will find that the carriers are violating the law by refusing the shipments, not as a matter of chance, but as an alternative to a general strike by the defendant unions. * * * In any event, if an order of the Shipping Board, aimed at the carrier, with the effective modes of enforcement prescribed by the Act, is not sufficiently persuasive to accomplish fair treatment, assuming that the alleged discrimination be found unfair, relief may be accorded under the provisions of Sections 828 and 830 (Title 46, *United States Code*, 46 U. S. C. A. Sections 828, 830) by including all other persons conspiring with the carrier to bring about the unfair and illegal result."

The Court of Appeals affirmed, stating as follows (199 N. E., at 688):

> "2. That the act of Congress of September 7, 1916 . . . 46 U. S. C. A. Section 801 . . . constitutes the sole law of the land to the extent of its scope, covering shipping by intercoastal and foreign shipping lines. 3. The U. S. Shipping Bureau has exclusive primary jurisdiction to determine whether or not carriers by water in interstate and foreign commerce have discriminated or unduly discriminated here. 4. Prior to seeking relief in any court the respondents must seek such relief in the U. S. Shipping Board, in the manner provided by the U. S. Shipping Act."

The Court of Appeals on a motion to amend the remittitur, included the following (200 N. E. at 54):

> "This court having held that if there is any illegality in defendants' actions, it arises from encroachment upon rights regulated by the Shipping Act; and that while this court has jurisdiction of the labor unions, yet, the courts of this state shall not grant an injunction until the Shipping Board has by its order defined plaintiff's rights."

E. Larabee and Puritan Coal cases distinguished.

Counsel for respondent herein relies principally upon the 1909 decision of this Court in *Missouri Pacific R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, in support of the proposition that the state courts have jurisdiction to adjudicate in the first instance whether interstate carriers acted discriminatorily and in dereliction of their common law duties in not providing pickup and delivery services at strike-bound premises. That case not only is distinguishable but is of doubtful authority. The issue therein was whether the state courts of Kansas could compel, by mandamus action, an interstate carrier to discharge its common law duty to treat all shippers alike by resuming the transfer and return of cars loaded and unloaded between the line of a connecting carrier and the flour mill and eleva-

tor of a particular shipper. The Court, speaking through Mr. Justice Brewer, declared that the Kansas courts did have such authority in the absence of any prior action or directive taken or issued by the Interstate Commerce Commission in the premises. There was a strong dissent by Mr. Justice Moody and Mr. Justice White, in which Mr. Justice Holmes indicated concurrence. The case can be distinguished from the present one on the following grounds:

1. The *Abilene* case, although decided just a few years earlier, was not discussed or even mentioned.

2. The conduct of which complaint was made involved an isolated act of discrimination against one particular shipper, not a practice regularly engaged in as is the case in the instant litigation, and there an obvious act of discrimination was involved.

3. The adjudication that the particular act was discriminatory would not operate to disrupt an existing rule or practice regularly engaged in by the carrier and did not provide a guide for future conduct as respects a particular practice complained of as discriminatory.

4. The regulatory action taken by the state in the premises was deemed by the majority of the Justices to be of a purely local character.

The dissenting opinion pointed out the inconsistency of the position taken by the majority in granting that the Interstate Commerce Commission would have jurisdiction over the controversy, but in permitting the state courts to exercise their jurisdiction in the absence of any assertion of authority by the Interstate Commerce Commission. The dissent stated (211 U. S. at 626):

> "I am not ready to assent to the proposition that, although the Congress has vested in the Interstate Commerce Commission the authority to deal with the exact situation presented to us, that fact is immaterial, because the Commission has taken no action. If the Commission has the authority to deal with a question of this kind, those who have grievances ought to resort

to that body for relief. It is a very great hardship to subject the carriers to possibly conflicting regulations, and leave them uncertain which government may rightfully assert its controlling authority. So it was said in the *McNeill* case, that the order there 'asserted a power concerning a subject directly covered by the act of Congress to regulate commerce, and the amendments to that act, which forbid, and provide remedies to prevent, unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce.' This statement was made as an additional reason for holding the state action invalid, and seems in conflict with the holding in this case."

Cases such as *Pennsylvania R. R.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, also relied upon by respondent, are distinguishable on the ground that in those cases state jurisdiction was permitted because there was no challenge respecting a particular rule or practice engaged in by a carrier, but only with the failure of the carrier to comply with its own rule or practice. In those cases no administrative expertise was required in the resolution of the issue. The rule is that resort to the Interstate Commerce Commission must be had in the first instance only when a rule or practice is attacked as unreasonable or discriminatory and not when a rule fair on its face is unequally applied. This Court, in the *Puritan Coal* case, stated in this respect as follows (at 131):

"But it must be borne in mind that there are two forms of discrimination, one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule or practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction

of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in Sec. 9.

"But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts."

F. Decisions of the Interstate Commerce Commission.

The fact that the Interstate Commerce Commission has on various occasions taken jurisdiction to adjudicate the precise issue in this case, *i.e.*, the legality of a carrier's practice in respect to making pick ups and deliveries at strike-bound plants, persuades to the conclusion that that body has such jurisdiction. It has taken jurisdiction in a number of cases and without challenge in the courts. See *Pick Up Delivery Restrictions in Official Territory*, 269 I.C.C. 191; *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 M.C.C. 719; *Montgomery Ward* v. *Santa Fe Trail Transportation Co.*, 42 M.C.C. 212; *Montgomery Ward* v. *Consolidated Freightways*, 42 M.C.C. 225; and *Montgomery Ward & Co., Inc.* v. *Chicago, Milwaukee, St. Paul & P. R. Co.*, 268 I.C.C. 257.

In *Pick Up Delivery Restrictions in Official Territory*, 269 I.C.C. 191, the Commission upheld as valid tariffs by which carriers limited their holding out so as to exclude picketed customers from those to whom service was offered. In holding the proposed tariff valid the Commission stated (at 192-193):

"Paragraph (c) of the proposed rule in the same item is an exception to the holding out of the carrier with respect to pick-up and delivery service at any

location where there is any riot, strike, picketing, or other labor disturbance, and is designed primarily to prevent the involvement of carriers in labor disputes in which they are not a party. The most common difficulty confronting the railroads in the performance of pick-up and delivery service is that resulting from strikes of employees of consignees and consignors. Most of the truck drivers employed by the carriers are members of unions, and these drivers usually refuse to cross picket lines. In at least one instance picketing of the carriers' own facilities resulted from performance of delivery service through a picket line. Defendants do not concede that they are at present required to perform service at locations where it is impracticable to do so, but the proposed rule is intended clearly to inform the public as to the holding out of the carriers so as to eliminate as much as possible, arguments and litigation with respect thereto.

"The change in respondents' method of giving notice of arrival of shipments is necessary because sometimes it is impossible to cross picket lines to leave the notice. Where the railroad has advance knowledge that a strike is in progress, it would be a vain act to send a truck to a location where it is known that the driver upon arrival will refuse to cross or will be prevented from crossing the picket line.

"There is nothing in the suspended schedules tending to show that respondents are attempting to escape or limit their common carrier duties. . . ."

The Commission pointed out that other such tariffs had been on file for some time without any complaints (at 196-198).

In the *Montgomery Ward* v. *Consolidated Freightways*, 42 M.C.C. 225, the Commission considered at length the question of the reasonableness of a motor carrier's action in refusing to make deliveries to strike-bound premises as against a charge that such action was discriminatory and unlawful under Section 213(b) of the Motor Carrier Act. In refusing to accord Montgomery Ward any relief the Commission stated (at pp. 230, 235):

"Turning to the facts in the instant proceedings, we think it is sufficiently clear upon this record that the defendants would have found it impossible to continue their operations with non-union labor, and we are of the opinion that it was not incumbent upon them to force the issue to the point of resorting to force and violence. Because of the comprehensive unionization of available labor and the existence of the closed-shop agreement, the defendants would have been confronted with strikes of their own labor if they had persisted in their attempts to serve the complainant, with the result that all of their operations would have been disrupted and probably brought to a standstill. The defendants were therefore faced with the choice, as they reasonably believed, of not serving the complainant and maintaining service to the general public, or of being compelled to discontinue all operations. Obviously, as between these defendants and the general public other than the complainant, the lack of service because of a general strike would have been caused by a strike in which the defendants were directly involved, and their position in defending suits for damages and proceedings before us similar to the instant proceedings, brought by other shippers, would have been more difficult, and their potential liability immeasurably magnified.

"Finally, the complainant urges that, even if it be assumed that under the circumstances prevailing at Portland the defendants found it impossible to serve its plant, this is not a valid excuse for the reason that the circumstances were created in part because of the 'voluntary' action of the defendants in entering into a closed-shop agreement. This agreement, in part, requires that only union members shall be employed, and that the employer shall not discipline any employee 'for upholding union principles.' It also contains the following provision:

* * * * * * *

"'*It shall not be a violation of this agreement for an employee to refuse to go through a picket line established by a bona fide A. F. of L. Union:* . . . (Emphasis supplied.)'

"The sentence italicized was added to the renewal

contract executed as of March 1, 1941, during the course of the strike. As above indicated, it is a 'union principle' not to cross a picket line of an affiliated union."

G. Criteria established in foregoing cases as applied to the instant case.

The foregoing authorities reveal several factors or circumstances which are determinative of whether the issue is one cognizable in the first instance by the Interstate Commerce Commission rather than by the various state or federal courts. The applicable criteria are found in the following questions which are usually asked by this Court in making a determination of jurisdiction:

1. Does the discrimination involve a general practice, rule, or regulation of a carrier as distinguished from an individual or a particular act of the carrier? If the former, exclusive jurisdiction in the Interstate Commerce Commission is indicated. In the present case we have such a general practice involved, as evidenced by the contract between the carrier and the union representing its employees containing the so-called "unfair goods" or "hot cargo" clause (R. 19, 21). Furthermore, the record discloses that the action of the carrier in refusing to make deliveries to struck plants was one applied to all shippers who became involved in picket lines and not merely one applied to American Tobacco alone (R. 50). J. L. Biery, terminal manager of Bowling Green Express, an interstate carrier, testified (R. 50):

> "Usually if there is a picket line, we don't request the men to go over it. They tell us that there is a picket line at such and such a place, and we let it go at that. We call the people and tell them the freight is there, and that is it."

2. Does the issue of discrimination call for a balancing of conflicting public interests by a body having expertise in the technical field involved as distinguished from a judicial

determination of whether an admittedly proper rule, practice, or regulation has been improperly or discriminatorily applied in a particular case? If so, the Interstate Commerce Commission alone can make the initial determination. The determination of the validity of the carriers' general practice not to offer service across picket lines called for an inquiry into all the relevant circumstances and a balancing of conflicting interests.

As appears from the decisions of the Interstate Commerce Commission discussed pp. 85-88, *supra*, it will appraise such factors as whether the carrier would risk a strike by all of its employees if it were to discharge and replace a driver respecting a picket line, thus possibly cutting off deliveries not only to American Tobacco, but to all customers and to the general public. The Interstate Commerce Commission would consider whether the refusal of the carrier's employees to cross the picket line was justified under the circumstances in view of possible violence and incriminations which might ensue. It would decide whether the duty owed the general public to maintain operations might be outweighed by whatever duty was owed American Tobacco Company or other individual customers. It would ascertain whether the practice of refusing to make deliveries in strike situations was a common one in the industry. All these determinations are peculiarly appropriate for resolution by an administrative, as distinguished from a judicial body. 3. Does the remedy establish a rule for the future to govern a continuing problem or merely an award of damages for a past completed act of discrimination? If the former, the Interstate Commerce Commission must make that determination in the first instance. Even where the award is of damages for the past, if the decision would have *in futuro* repercussions by invalidating a general practice, the Interstate Commerce Commission has exclusive primary jurisdiction. Here, the Kentucky courts not only found the practice of refusing to make deliveries to strikebound premises an improper and discriminatory one, but specifically en-

joined such practice in the future either with or without the benefit of the so-called "unfair goods" clause and regardless of any surrounding circumstances. Thus, the determination involved not only a guide but a command respecting future action—a command which the carrier would be obliged to follow in Kentucky but not elsewhere.

CONCLUSION

For the foregoing reasons we respectfully request that this Court reverse the judgment of the Kentucky Court of Appeals and remand with directions to vacate Paragraph 4 of the injunction issued against Local 89 and its members, which reads as follows (R. 36-37):

> "4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers."

Respectfully submitted,

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January 28, 1955.

APPENDIX

The pertinent provisions of the Constitution of the United States are as follows:

"Article I.

"Section 8. The Congress shall have power . . .

. . . . . .

"To regulate Commerce with foreign nations, and among the several states and with the Indian Tribes;

. . . . . .

"Article VI.

. . . . . .

"The Constitution, and Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.*) are as follows:

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in

their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * * *

"DEFINITIONS

"Sec. 2. When used in this act—

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his

parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

• • • • • • •

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

• • • • • • •

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • • • • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: • • •

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * * *

"**PREVENTION OF UNFAIR LABOR PRACTICES**

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * * * *

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of the law: * * *

* * * * * * *

"LIMITATIONS

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. * * *"

* * * * * * *

NATIONAL EMERGENCIES

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a

written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public. * * *

* * * * * * *

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

* * * * * * *

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to

cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * * * *

DEFINITIONS

Sec. 501. When used in this Act—

* * * * * * *

(2) The term "strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

* * * * * * *

SAVING PROVISION

Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

The pertinent provisions of the Interstate Commerce Act, as amended (54 Stat. 924, 63 Stat. 488, 49 U. S. C. 301, *et seq.*) are as follows:

"§316. Rates; fares and charges—(a) Duty to establish reasonable rates, etc.; service and equipment; rules and regulations; reasonable division of joint fares.

* * * * * * *

"Undue preferences or prejudices prohibited.

(d) All charges made for any service rendered or

to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

"Complaints to and investigation by commission; power of commission to fix reasonable rates, regulations, etc.

"(c) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by aay common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers, affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the

lawful rate, fare or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interst, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: Provided, however, That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

* * * * * * *

"§322. Unlawful Operation—(a) Violation of Chapter or rules or orders; penalties where none otherwise provided.

* * * * * * *

"Jurisdiction of district courts to restrain violations and enforce orders.

"(b) If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and repre-

sentatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

The pertinent provisions of the Constitution of the Commonwealth of Kentucky are as follows:

"§196. Transportation; charge for; common law liability.—Transportation of freight and passengers by railroad, steamboat or other common carrier shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability."

The pertinent provisions of the Kentucky Revised Statutes are as follows:

"Section 281.600. Administrative Functions and Powers of the Department.

"The Department of Motor Transportation shall exercise all administrative functions of the state in relations to motor transportation as defined in this chapter, and shall apply, as far as practical, the administrative and judicial interpretations of the Federal Motor Carrier Act. It shall have the right to regulate motor carriers as provided in this chapter, and to that end may establish reasonable requirements with respect to continuous and adequate service of transportation, systems of accounts, records and reports, preservation of records and safety of operation and equipment. It may issue subpoenas, subpoenas duces tecum, and orders of personal attendance for the attendance of witnesses, any proceeding before it, and permit the protection of pertinent records, for taking of depositions, or in accord with the Civil Code of Practice, and it shall have the power to make such rules and regulations as it may deem necessary to carry out the provisions of this chapter.

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"Section 281.610. Regulation of Interstate Commerce.

"(1) The provisions of this chapter shall apply to interstate commerce, except insofar as such application is in conflict with any provision of the Constitution of the United States or the Acts of Congress.

"(2) The Commissioner may grant a certificate of convenience and necessity for the transportation of persons or property for compensation in interstate commerce, and may regulate such interstate commerce under the authority of and in accordance with the provisions of any Act of Congress vesting in or delegating to the Commissioner such authority as an agency of the United States Government. The Commissioner may notify the proper department of the Federal Government of his assent to the requirements and conditions of such Act of Congress in regard to interstate commerce by motor vehicle.

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"Section 281.685. Adherence to Rates, Charges, and Schedules; Discrimination.

"(1) No common carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons and property or for any services, in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with the Department and in effect at the time; nor shall any common carrier refund or remit any part of the rates, fares or charges so specified, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination.

(2) No contract carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any services in connection therewith then that contained in the contract required to be filed with the Department and in effect at the time; nor shall any contract carrier refund or remit any part of the charges specified in the contract, or make or give any unreasonable prefer-

ence or advantage to any person, or subject any person to any unreasonable discrimination.

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"Section 336.130. Employees may organize, bargain collectively, strike, picket, conduct prohibited.

"(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

"(2) Neither employers or their agents nor employes or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or resort to violence, intimidation, threats or coercion."

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